(17,368.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 262.

THE NEW YORK LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

FANNIE CRAVENS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

INDEX.

	Original.	Print.
Caption	1	1
Writ of error	2	1
Transcript filed	3	2
Transcript from circuit court of Jackson county	3	2
Petition	3	3
Answer	7	6
Reply	15	10
Proceedings in circuit court at Independence	15	11
Judgment	16	11
Modification of judgment	17	11
Motion for new trial filed	18	12
Motion to retax costs filed	18	12
Motion to retax costs sustained	18	12
Motion to modify sustained and judgment modified	19	12
Bill of exceptions filed	19	13
Bill of exceptions	20	13
Agreed statement of facts	20	13
Exhibit D—Policy of insurance	25	17
C—Application for insurance	34	22

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 20, 1899.

	Original.	Print.
Declarations made to medical examiner	39	25
Plaintiff's objections to agreed statement	42	28
Motion for new trial	43	28
Motion to retax costs	43	28
Bill of exceptions signed	44	29
Certificate of official stenographer	44	29
Clerk's certificate	44	29
Cause submitted	46	29
Cause transferred to court in banc	46	30
Cause submitted in banc	46	30
Judgment	47	30
Opinion	47	30
Motion for rehearing filed	72	46
Motion for hearing	72	46
Motion to modify the opinion	74	48
Motion for rehearing denied	75	48
Motion to modify opinion sustained and opinion modified	75	48
Opinion as modified	76	49
Writ of error allowed, citation signed, assignment of errors filed, and bond approved and ordered filed	100	64
Assignment of errors	101	65
Bond on writ of error	102	65
Clerk's certificate	103	66

1 The United States of America to Fannie Cravens, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at Washington, D. C., not exceeding thirty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Missouri, wherein The New York Life Insurance Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James B. Gantt, chief justice of the supreme court of the State of Missouri, this twenty-first day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

JAS. P. GANTT,
Presiding Judge.

[Endorsed:] Fannie Cravens *vs.* New York Life Insurance Co. Citation. Filed March 21st, 1899. Jno. R. Green, clerk.

UNITED STATES OF AMERICA,
Central Division of the Western District of Missouri, } *ss:*

I hereby acknowledge due service of the within citation this 21st day of March, A. D. 1899.

WILLIAM B. C. BROWN,
Attorney for Defendant in Error.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, at the October term, 1898, thereof, between Fannie Cravens, plaintiff and appellant, and The New York Life Insurance Company, defendant and respondent therein, a manifest error hath happened, to the great damage of the said New York Life Insurance Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., not exceeding thirty days from and after the date of the citation in this cause, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that

error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this twenty-first day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

Issued at office, in the city of Jefferson, with the seal of the circuit court of the United States for the western district of Missouri, central division, dated as aforesaid.

{ Seal of the United States Circuit Court for the Western District of Missouri, Central Division. }

H. C. GEISBERG,
Clerk Circuit Court United States, Western District of Missouri, Central Division.

Allowed by—
JAS. B. GANTT,
Chief Justice.

[Endorsed:] No. —. United States circuit court, western district of Missouri. Fannie Cravens *vs.* New York Life Insurance Company. Writ of error to the supreme court of the State of Missouri. Returned and filed 21st day of March, 1899. Jno. R. Green, clerk.

Return to Writ.

UNITED STATES OF AMERICA, *Western District of Missouri,* } *ss:*

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said supreme court, at the city of Jefferson, this 31st day of March, A. D. 1899.

JNO. R. GREEN, *Clerk.*

3 STATE OF MISSOURI, *sct:*

Be it remembered that heretofore, to wit, on the 7th day of November, 1894, there was filed in the office of the clerk of the supreme court of the State of Missouri a transcript from the circuit court of Jackson county, in which Fannie Cravens was appellant and The New York Life Insurance Company was respondent; which said transcript is in words and figures as follows, viz:

STATE OF MISSOURI, *County of Jackson,* } *ss:*

Be it remembered that on the 23rd day of September, A. D. 1893, there was filed in the office of the clerk of the circuit court of Jackson county, State of Missouri, at Kansas City, the papers and tran-

script of proceedings on change of venue from the circuit court of Jackson county, Missouri, at the city of Independence, wherein Fannie Cravens is plaintiff and The New York Life Insurance Co. is defendant.

Which petition is in the words and figures following, to wit:

In the Circuit Court of Jackson County, at Independence, Mo., June Term, A. D. 1893.

FANNIE CRAVENS, Plaintiff,
vs.
THE NEW YORK LIFE INSURANCE CO., a Corporation, Defendant.

Comes now Fannie Cravens, the plaintiff herein, and complains to this court of The New York Life Insurance Company, the defendant herein, and for cause of action against defendant states that defendant now is, and during all the dates hereinafter mentioned was, a corporation created by and existing under the laws of the State of New York.

4 That said defendant is now doing business and during all the dates hereinafter mentioned did business as a life insurance company in the State of Missouri, and for this purpose maintained an office and kept agents thereat in the county of Jackson, in said State, and is and was during all the dates hereinafter mentioned subject to the laws of the said State of Missouri.

That on the 2nd day of May, A. D. 1887, and long prior thereto, John K. Cravens was a citizen of said State of Missouri and resided in the county of Jackson, in said State.

That on said date and long prior thereto said John K. Cravens was the husband of this plaintiff, and thereafter continued to be the husband of this plaintiff until the time of his death.

That on the said 2nd day of May, 1887, defendant solicited and requested said John K. Cravens, in the said county of Jackson, in the State of Missouri, to insure his life in defendant's company.

That thereupon the said John K. Cravens made written application to defendant through its said agents and servants, then and there being in the said county of Jackson, in the State of Missouri, to purchase and obtain insurance upon his life in defendant's company in the sum of ten thousand dollars ($10,000.00); that said application for insurance contained a clause in words as follows, to wit: That "under no circumstances shall the policy hereby applied for be in force until the actual payment to and acceptance of the premium by the company or its authorized agent during the lifetime and good health of the person on whose life insurance is applied for;" that afterwards said defendant accepted said application of said John K. Cravens, and on the 11th day of May, A. D. 1887, executed its policy of insurance, numbered 250,213, a copy of which is herewith filed; which said policy of insurance contained a copy of the application for insurance made by said Cravens above referred to and made same a part of said policy or contract of insurance.

5 The said policy of insurance was by defendant delivered to said John K. Cravens in the county of Jackson, in the State of Missouri, and that the first premium called for by said clause so contained in said application and policy or contract of insurance and set forth in this petition in the language of said application and policy of insurance was by said John K. Cravens paid to and accepted by the defendant in the State of Missouri.

That said policy of insurance so issued to said John K. Cravens contained a further clause in words and figures as follows, to wit:

Amount, $10,000.

The New York Life Insurance Company by this policy of insurance, in consideration of the agreements, statements, representations and warranties submitted to its officers at the home office in the city of New York, in the written application for this policy, which are hereby referred to and made a part of this contract, and in further consideration of the sum of five hundred and eighty-nine dollars and fifty cents, to them in hand paid, at the office of the company in the city of New York by the assured under this policy, to wit: Fannie Cravens wife of John K. Cravens and of the annual payment of five hundred eighty-nine dollars and fifty cents, to be made at said office on or before the eleventh day of May in every year during the continuance of this policy, until fifteen full years' premiums shall have been paid, doth insure the life of John K. Cravens, lawyer, of Kansas City, in county of Jackson State of Missouri (hereinafter called the insured) in the amount of ten thousand dollars, commencing on the eleventh day of May, 1887, at noon. And the said company doth hereby promise and agree to pay the amount of the said insurance at its office in the city of New York, to the said assured, for her sole use, if living, in conformity with the statute, and if not living, to the children of said Fanny Cravens or their guardian, for their use, or if there be no such children surviving, then to the executors, administrators or assigns of the said insured, upon receipt and approval at

6 said office of proofs, as hereinafter required, of the death, during the continuance of this policy of the said insured, deducing therefrom all indebtedness to the company, together with any balance of the year's premium remaining unpaid.

Whereby defendant agreed with Fannie Cravens, the plaintiff in this cause and wife of said John K. Cravens, in consideration of the annual payment to defendant of the sum of five hundred and eighty-nine dollars and fifty cents ($589.50) on the 11th day of May of each year until it had received fifteen full years' premium, to insure the life of said John K. Cravens in the amount of $10,000.00 and to pay to said Fannie Cravens the amount of said insurance, to wit, ten thousand dollars ($10,000.00) upon receipt and approval at its office, in the city of New York, of proofs of death of said John K. Cravens during the continuance of said policy; that said John K. Cravens, in addition to the first premium hereinbefore set out and declared to have been paid to defendant, paid to defendant in the State of Missouri each of the annual premiums on said policy of insurance

for the years A. D. 1888, 1889, and 1890 when they became respectively due, and defendant received and accepted same in said State of Missouri—that is to say, said John K. Cravens paid altogether to defendant four full annual premiums on said policy of insurance.

That afterwards, on the 2nd day of Nov., 1892, the said John K. Cravens died in the said county of Jackson and State of Missouri, and on the 30th day of November plaintiff herein delivered to defendant, upon forms obtained by plaintiff from defendant for said purpose, proofs of death called for by said policy of insurance, and said proofs were by defendant at said time received and accepted.

That by virtue of the aforesaid payments of premiums on said policy of insurance said policy of insurance on the 11th day of May, 1891, had under the laws of the State of Missouri acquired a
7 net value and was worth the sum of twelve hundred and ninety $\frac{94}{100}$ ($1,290.94) dollars, computed upon the American table of mortality, with four and one-half per cent. interest.

That neither the said John K. Cravens, the insured, nor the plaintiff was indebted to the defendant at that time for unpaid premiums or on any other account.

That said John K. Cravens on said 11th day of May, 1891, was fifty-three years of age; that three-fourths of such net value of said policy of insurance applied, and, taken as a net single premium for temporary insurance for the amount written in the said policy, to wit, ten thousand dollars ($10,000.00), entitled said John K. Cravens, the insured, to a temporary insurance for said amount for a term expiring six years and forty-six days from May 11th, 1891, and that said policy was by reason of the premises and the provisions of the statutes of Missouri kept and continued in full force and effect until 26th day of June, 1897.

Wherefore plaintiff asks judgment against the defendant in the sum of ten thousand dollars ($10,000.00), with interest, at the rate of 6 %, from the 30th day of November, 1892, and for her costs in this suit expended.

WILLIAM B. C. BROWN AND
KARNES, HOLMES & KRAUTHOFF,
Pl'ff's Att'ys.

The following entry appears upon the back of said petition: "Filed May 15, '93. H. H. Noland, clerk, by H. G. Henley, D. C."

The answer filed in the circuit court of Jackson county, at Independence, Missouri, on the 26th day of June, 1893, is in the words and figures following, to wit:

In the Circuit Court of Jackson County, at Independence, June Term, 1893.

STATE OF MISSOURI, } ss:
County of Jackson, }

8 FANNY CRAVENS, Plaintiff,
vs.
NEW YORK LIFE INSURANCE COMPANY, Defendant.

Now comes The New York Life Insurance Company, defendant herein, and admits that it is a body corporate organized under the laws of the State of New York, but denies all the other allegations of the petition except such as are hereinafter expressly admitted.

Further answering, defendant says that at the date referred to in the petition it was and is now a mutual life insurance company, organized under the laws of the State of New York, and having its chief office in the city of New York, in that State, having no capital stock, being organized for the chartered purpose of insuring lives on the mutual plan by administering the assets derived from the premiums paid solely for the mutual benefit of the policy-holders by whom or on whose behalf such premiums are paid.

Defendant further says that such mutual business has been and is conducted solely upon written applications, signed by the parties desiring to insure upon such mutual plan, and specifying the specific form of policy contract desired, which have been and are forwarded to the defendant's home office for consideration and acceptance or rejection by its officers at said home office.

Defendant further states that among the plans of insurance adopted in the conduct of such mutual business was that known as the "fifteen-year endowment, non-forfeiting limited tontine plan," whereby all the policies issued on that plan in the same year, with the same tontine period of fifteen years, acquired each a contingent interest, in the event of survivorship of the said tontine period of fifteen years, in the profits and surplus derived from the premium on policies of said class which should lapse or for any reason not be

9 in force at the date of the expiration of said fifteen years' tontine period. This plan also included as an essential feature and part thereof, incorporated in the policies issued thereunder to all the policy-holders of the class, a provision for a paid-up policy in event of lapse, as then provided by the laws of the State of New York, and each of the policies issued under said plan contained the same provisions for paid-up insurance in the event of lapse and as to the rights and interest of said survivors of the tontine period.

Defendant further states that on or about the 2nd day of May, 1887, one John K. Cravens, then a citizen of the State of Missouri and a resident of Kansas City, in said State, made his certain application in writing to said defendant, which was signed by said John K. Cravens, the party whose life was proposed to be insured, and Fannie Cravens, his wife, the plaintiff herein, and the party for whose benefit the said insurance was applied for, for a policy of in-

surance on the life of said John K. Cravens in the sum of $10,000.00, which said application, so signed, specifically selected, called for, and described, and requested this defendant to issue a policy of the class and character hereinbefore set forth and described and to contain the terms and conditions specifically set forth in said application. Said written application was by the terms thereof to be transmitted, together with the medical examination of said Cravens, to the defendant, at its home office, in the city of New York, for its consideration there by the officers of the company and its acceptance or rejection by them at said home office. Said written application, so signed and made the basis of the contract of insurance, provided that the entire contract contained in the policy and application should be construed and interpreted as a whole and in each of its parts and obligations according to the law of the State of New York, and therein and thereby the place of contract was expressly agreed to be the principal office of the company in the city of New York.

Said written application, thus signed by said John K. Cravens and plaintiff, selecting the said plan of insurance, specifically provided and required that the policy to be issued thereunder should contain an agreement in words as follows:

"If it shall lapse or become forfeited for the non-payment of any premium after being in force three full years, a paid-up policy shall be issued on demand being made within six months after such lapse with surrender of the policy, under the same conditions as this policy except as to payment of premiums, but without participation in the profits, for such an amount as the net reserve on the policy at the time of lapse, computed according to the American tables of mortality, and interest at 4½ %, after deducting all indebtedness to the company, will purchase as a single premium at the present published rates of the company, at the age of the insured at the time of lapse for an ordinary life policy or for such an amount as shall be represented by as many proportional parts of the sum insured as there shall have been complete annual premiums paid thereon when the lapse or default above referred to shall first be made, if a limited-payment life policy or an endowment policy."

And said application so signed by said Cravens further provided that if this defendant would issue a policy of the character and class applied for containing said agreement for paid-up insurance in event of lapse, said applicant, in consideration thereof, waived and relinquished all right, claim, or interest to or in any temporary insurance, surrender value, or other paid-up policy, whether required or provided for by any statute of any State or not.

The said application specifically selecting the aforesaid plan of insurance was thereupon forwarded with the medical examination of said John K. Cravens to the home office of the defendant, and there, upon consideration, it was accepted according to the terms and conditions therein stated and not otherwise, and thereupon, at its said home office, in the State of New York, this defendant issued a policy of the class and character thus applied for and containing the precise terms and conditions in said application specified, being policy No. 250,213, sued upon in this cause.

Defendant further states that during the same year it issued
11 upon a similar application to parties resident in the different States and Territories of the United States and in foreign countries policies of the same class, with the same, dividend period, each of said applications and policies containing the same conditions, including the aforesaid provision for a paid-up policy in case of lapse or default, was an essential part of each of said contracts of insurance, and without said provision said policy sued upon would not have been issued.

And defendant further says that the law of New York was made the applicatory law of the said contract of insurance evidenced by said policy No. 250,213 by the express agreement of the parties thereto as well as of all other parties holding policies of the same class of the same tontine dividend period, each of whom by the terms of their policy contracts acquired with the plaintiff mutual interests in the profits and surplus to be derived from the premiums on all policies of such class, as hereinbefore set forth.

Defendant further states that said contract and policy of insurance No. 250,213 was conditioned upon the payment of the annual premium of 589.50 therein provided, which, by the terms of said policy, was to be paid at the office of the defendant, in the city of New York and State of New York, on or before the 11th day of May in every year during the continuance of the policy until fifteen full years' premiums had been paid, and by the express terms of said policy if the premiums were not paid on or before the days when due the policy should become void and all payments previously made should become forfeited to the company, except only that the policy contained a provision for a paid-up policy, which was specifically applied for in the application, and which, as aforesaid, was contained in all the policies of the same tontine class, to wit:

"If this policy, after being in force three full years, shall lapse or become forfeited for the non-payment of any premium, a
12 paid-up policy shall be issued on demand made within six months after said lapse under the same conditions as this policy except as to the payment of premises and the return of premiums paid, but without participation in profits, for an amount equal to as many fifteenths part of the sum above insured as there shall have been complete annual premiums paid thereon when said default in the payment of premiums shall be made; and all right, claim or interest arising under statute or otherwise, to or in any other paid-up policy or surrender value, and to or in any temporary insurance whether required or provided by the statute of any State or not, is hereby expressly waived and relinquished."

It was further provided by said policy that all premiums were due and payable at the home office of said company unless otherwise agreed in writing.

Defendant further states that four annual premiums were paid upon said policy, and that default was made in the payment of the annual premium due and payable on the 11th day of May, 1891, and thereupon said policy contract by its terms lapsed and became void, and all previous payments made were forfeited to this defend-

ant, except that under the terms of said application and policy, the said policy having been in force for three full years, plaintiff became entitled on demand being made within six months after such lapse with surrender of the policy to a paid-up policy for an amount equal to as many fifteenth parts of the sum insured as there had been complete annual payments paid thereon, and defendant states that the amount of paid-up insurance the holder of said policy was entitled to on demand being made therefor, as provided in the policy, was the sum of $2,670.00. Defendant states that no demand for such paid-up insurance with surrender of said policy was made by said John K. Cravens or Fannie Cravens within six months after lapse or at any time.

Defendant states that thereafter proofs of death were filed on behalf of plaintiff herein, stating that the said insured, John
13 K. Cravens, departed this life on the 2nd day of November, 1892, and this defendant then and there offered to waive, and did waive, the failure to make demand for said paid-up insurance provided for in the policy, and offered to pay, and now offers to pay, in full discharge of its liability under said policy the amount so agreed upon by the parties in the said application and policy, to wit, the amount of paid-up insurance which said policy would have been entitled to on demand therefor, the sum of $2,670.00, and this defendant hereby tenders the said amount into court, and says that plaintiff ought not to have any other or different recovery upon said policy, and asks to be hence discharged with its costs.

And, further answering, defendant says that by reason of the facts hereinbefore set forth this defendant has incurred obligations to the surviving policy-holders of the same tontine dividend period to which said policy, No. 250,213, belonged, and said surviving policy-holders have acquired rights, based upon the performance by the defendant and each of the policy-holders of said class, including plaintiff, of the terms of their respective policies, and that this defendant cannot pay to plaintiff any greater amount than that fixed by said policy and which is herein tendered without discriminating in her favor against her fellow policy-holders of the same class, and defendant therefore says that plaintiff is estopped by reason thereof from asserting any claim under said policy other than for the aforesaid sum of $2,670.00, which is herein tendered.

Wherefore defendant asks to be hence discharged.

Further answering, defendant says that the said policy of insurance sued on, No. 250,213, was not entitled to temporary insurance for the amount written in the policy for the term alleged in the petition or for any term whatever, for that the statutes of Missouri in relation to the non forfeiture of life-insurance policies re-
14 lied upon in the petition did not apply and had no reference to the contract of insurance evidence by the policy sued upon, in that the said contract was made under and with reference to the laws of the State of New York, and that the application for said policy was accepted in the State of New York, and, by the express agreement of the parties to the policy and of all parties interested in the aforesaid tontine class, the law of New York was made

the applicatory law of said contract; and defendant further says that its right to make said contract evidenced by said policy of insurance was and is a right and privilege guaranteed and secured to it by the bill of rights and constitution of the State of Missouri and the Constitution of the United States, and if the said statutes so relied upon by plaintiff are construed so as to apply to the said policy of insurance and nullify the said agreement of the parties upon the faith of which the said policy was issued and without which it would not have been issued, then said statutes so construed are violative of the said constitutional right and immunity so secured to this defendant by the constitution and bill of rights of the State of Missouri and the Constitution of the United States.

Wherefore defendant asks to be hence dismissed with its costs.

By its attorneys, JUDSON & TAUSSIG.

F. N. JUDSON, *Of Counsel.*

The said answer is marked on the back in words and figures following, to wit:

Filed June 26, '93. H. H. Noland, cl'k, by H. G. Henley, D. C.

15 Plaintiff's reply to the answer of defendant, filed at Independence July 14th, 1893, is in the words and figures following, to wit:

In the Jackson Circuit Court, at Independence, June Term, 1893.

FANNIE CRAVENS, Plaintiff,
vs.
THE NEW YORK LIFE INSURANCE COMPANY, Defendant. } No. 4022.

Comes now plaintiff herein and, for reply to defendant's answer filed herein, denies each and every allegation in said answer contained not expressly admitted by plaintiff's petition.

For further reply to defendant's answer plaintiff says that the policy or contract of insurance herein sued upon contains a further clause that all premiums may be paid to agents producing receipts signed by the president, vice-president, or actuary and countersigned by such agents.

WILLIAM B. C. BROWN AND
KARNES, HOLMES & KRAUTHOFF,
Att'ys for Plaintiff.

The said reply is marked on the back in the words and figures following, to wit:

Filed July 14, '93. H. H. Noland, cl'k, by H. G. Henley, D. C.

The transcript of the proceedings had in the circuit court of Jackson county, at Independence, Missouri, is in the words and figures following, to wit:

In the Circuit Court of Jackson County, Missouri, at Independence, September Term, 1893, 2nd Day, September 12th, 1893.

16 FANNIE CRAVENS *vs.* N. Y. LIFE INS. Co. } 4022.

Now comes the parties hereto, by their respective attorneys, and file stipulation for the transfer hereof.

It is therefore ordered by the court, in accordance therewith, that this cause, together with the original papers, be transferred to division No. 2 of this court.

A true copy.

Attest: H. H. NOLAND, *Clerk*,
[SEAL.] By H. G. HENLEY, *D. C.*

On December 9th, A. D. 1893, at and during the regular October term, A. D. 1893, of the circuit court of Jackson county, State of Missouri, sitting at Kansas City, div. No. two (2), Hon. J. H. Slover, judge, presiding, the same being the 53rd day of said term, the following proceedings were had and made of record in the cause entitled—

FANNIE CRAVENS *vs.* NEW YORK LIFE INSURANCE Co. } 18840.

Comes now defendant, by attorney, and files herein objections to sections 17 and 18 of agreed statement of facts.

On the 14th day of April, A. D. 1894, it being the 6th day of the regular April term, A. D. 1894, of the circuit court of Jackson county, the following proceedings were had and made of record in the cause entitled—

17 FANNIE CRAVENS *vs.* NEW YORK LIFE INSURANCE COMPANY, a Corporation. } 18840.

Now, on this day, come parties herein, by attorney, and this cause having heretofore been submitted to the court upon the petition and evidence and the court, being now fully advised in the premises, finds that said defendant is indebted unto said plaintiff in the sum of $2,670.00.

It is therefore ordered and adjudged by the court that plaintiff recover of and from defendant, New York Life Insurance Co., a corporation, the sum of twenty-six hundred and seventy ($2,670.00) dollars, with interest thereon from this day, and all costs herein incurred, and have execution therefor.

A modification of the judgment in favor of Fannie Cravens and against the New York Life Insurance Co. aforesaid is entered on

the margin of the record, opposite the judgment herein; which said entry is in the words and figures following, to wit:

APRIL 24TH, 1894.

I hereby release from the lien of this judgment *of* the west eleven (11) feet of lot two (2), all of lot three (3), and the east fifteen (15) of lot four (4), in block D of the resurvey of Reid's addition to the city of Kansas (now Kansas City), Jackson county, State of Missouri.

FANNIE CRAVENS,
By W. B. C. BROWN,
Her Attorney.

Attest: H. H. NOLAND, *Clerk*,
By H. S. RAGLAND, *D. C.*

(See modification of judgment on page 331.)

On the 17th day of April, A. D. 1894, it being the 8th day of the regular April term, A. D. 1894, of said court, the following proceedings were had and made of record in the cause entitled—

FANNIE CRAVENS
vs.
NEW YORK LIFE INSURANCE CO. } 16012.

Comes now plaintiff, by attorney, and files herein motion for a new trial.

On the 7th day of June, A. D. 1894, it being the 45th day of the regular April term, A. D. 1894, of said court, the following proceedings were had and made of record in the cause entitled—

FANNIE CRAVENS
vs.
NEW YORK LIFE INSURANCE COMPANY. } 18840.

Comes now defendant, by attorney, and files herein motion to modify judgment and also motion to retax costs.

On the 23rd day of June, 1894, it being the 50th day of the regular April term, A. D. 1894, of said court, the following proceedings were had and made of record in the cause entitled—

FANNIE CRAVENS
vs.
NEW YORK LIFE INSURANCE COMPANY. } 18840.

Now, on this day, come parties herein, by attorney, and the motion of said defendant to retax costs herein being now taken up, the same is by the court sustained. The motion of defendant to modify judgment heretofore entered herein on April 14th, 1894, being now taken up and submitted to the court, the court, being fully advised, doth sustain said motion to modify said judg-
19 ment by striking from said judgment the following words, to wit, "with interest thereon from this day and all costs

herein incurred;" to which ruling of the court said plaintiff excepts. Wherefore the court orders that said judgment so rendered, as aforesaid, be now modified and corrected as follows, to wit:

Now, on this day, come parties herein, by attorney, and this cause having heretofore been submitted to the court upon the petition and evidence, and the court, being now fully advised in the premises, finds that said defendant is indebted unto said plaintiff in the sum of $2,670.00.

It is therefore ordered and adjudged by the court that plaintiff recover of and from defendant, New York Life Insurance Company, a corporation, the sum of twenty-six hundred and seventy ($2,670.00) dollars, and that defendant recover of plaintiff all costs herein incurred, and that execution issue in conformity herewith. Plaintiff's motion for a new trial of this cause being now taken up, the same is by the court overruled; to which ruling said plaintiff excepts. Plaintiff files herein affidavit for an appeal; which appeal is by the court allowed as prayed to the supreme court of the State of Missouri, and plaintiff is given until on or before the first day of the October term, 1894, of this court in which to file her bill of exceptions.

On the 8th day of October, 1894, of the circuit court of Jackson county, the following proceedings were had and made of record in the cause entitled—

FANNIE CRAVENS
vs.
NEW YORK LIFE INSURANCE CO. } 18840.

20 Comes now plaintiff, by attorney, and presents to the court her bill of exceptions; which said bill is by the court signed and sealed and ordered to be filed and made a part of the record herein, which is accordingly done.

Which said bill of exceptions is in the words and figures following, to wit:

In the Jackson Circuit Court, at Kansas City, Missouri, April Term, 1894.

FANNIE CRAVENS, Plaintiff,
vs.
THE NEW YORK LIFE INSURANCE COMPANY, Defendant.

Be it remembered that on the trial of this cause the following proceedings were had:

A jury was waived by the parties to this cause, plaintiff and defendant. The cause was submitted to the court and tried by the court without a jury upon the following agreed statement of facts and exhibits, to wit:

Agreed Statement of Facts.

It is hereby stipulated and agreed by and between the parties to the above-entitled cause that the same may be submitted to the

court for decision and judgment upon the issues therein made by the pleadings and the following agreed statement of facts, to wit:

1. That the defendant is a corporation organized and existing under the laws of the State of New York as a mutual life insurance company, without capital stock, having its chief office in the city of New York, and was at the date of issuing the policy in question and since has been and now is engaged in the business of insuring lives through branch offices in the different States and Territories of this country and certain foreign countries.

21 A copy of the charter of the defendant is herewith filed as Exhibit "A" and made a part hereof as fully as if set forth herein.

2. That the defendant for many years past has maintained branch offices in the State of Missouri, and has employed agents to solicit applications for insurance from citizens of Missouri, and in the year 1887, as both prior and subsequent thereto, defendant had received from the superintendent of insurance a certificate of authority to transact business in said State, which certificate is herewith filed as "Exhibit B" and made a part hereof as fully as if set forth herein.

3. That during the year 1886 and prior to the issuance of the policy sued upon the amount of policies issued by defendant to citizens of Missouri was $1.617,985.00, and the amount of insurance in force on the lives of citizens of Missouri on December 31st, 1886, was $8,886,542.00, and the total amount of policies issued by defendant in said years 1886 was $85,178,294.00, and the total amount of policies in force on December 31st, 1886, issued by defendant was $304,373,540.00.

4. That on the 2nd day of May, 1887, and long prior thereto John K. Cravens was a citizen of the State of Missouri and resident of the county of Jackson, in said State; that on the said date and long prior thereto said John K. Cravens was the husband of Fannie Cravens, the plaintiff herein, and thereafter continued to be the husband of said plaintiff, Fannie Cravens, until the time of his death.

5. That the defendant in the transaction of its business *and* adopted different forms of policies, embodying different and varying plans of insurance, all of them being on the mutual plan, the premiums paid, less the expense of management, being administered solely for the benefot of the policy-holders, defendant having no capital stock.

22 6. That on the 2nd day of May, 1887, the local agents of defendant solicited said John K. Cravens, at his residence, in the county of Jackson and State of Missouri, to insure his life in the defendant company, and submitted to him the different plans of insurance then in use by said defendant, and said John K. Cravens selected the plan known as the non-forfeiting, limited, tontine policy, 15-year endowment, with limited premium return, and signed a written application therefor, and also signed the same in the name of the plaintiff, Fannie Cravens, as beneficiary of the policy to be issued thereunder; which said application is herewith filed as "Exhibit C" and made a part hereof as fully as if set forth herein.

Said written application was thereupon delivered to defendant's agent at Kansas City and was by him forwarded with the report of the medical examination of said Cravens; which said medical examination of said Cravens was made by the examiner of defendant company at Kansas City, in the State of Missouri, and by said agent forwarded to defendant's home office, in the city of New York.

7. That thereafter, on the tenth day of May, 1887, said application and medical examination was received at the home office of the defendant, in the city of New York, State of New York, and was there examined by the officers of defendant, and on the eleventh day of May said application and medical examination was accepted and approved, and the policy in suit, No. 250,213, was thereupon executed by the officers of said defendant at said home office; which said policy is herewith filed and marked "Exhibit D" and made a part hereof as fully as if set forth herein.

8. That said policy was transmitted by defendant to its agents at Kansas City, in Jackson county, and on the 20th day of May, 1887, the policy was delivered to said Cravens in the county of Jackson, in the State of Missouri, by said agent, and the first premium
23 of $589.50 was paid by said Cravens in the State of Missouri to the said agent of defendant and by said agent transmitted to defendant's home office.

9. That said Cravens thereafter paid to defendant the premiums due upon said policy upon the 11th day of May, 1888, and on the 11th day of May, 1889, and on the 11th day of May, 1890, the amount of each of said premiums being received by the agent of the defendant from said Cravens at defendant's branch office in Kansas City and transmitted to defendant's home office, said agent delivering therefor to said Cravens receipts of defendant signed by the chief officers of the company and countersigned by said agent.

10. That default was made in the payment of the premium due on the 11th day of May, 1891, and said premium has not been paid and no subsequent premium has been paid.

11. That said John K. Cravens died in Kansas City, in the State of Missouri, on the second day of November, 1892, and thereafter, on the 30th day of November, 1892, proofs of death in due form, as called for by the policy of insurance, were by Fannie Cravens made out and delivered to defendant and received by defendant. A copy of said proofs of death is herewith filed and marked "Exhibit E" and made a part hereof as fully as if set forth herein.

12. That the amount of paid-up insurance to which the policy in suit, No. 250,213, was entitled, according to the terms of the application and policy, was $2,670; that no demand for such paid-up policy was made by or on behalf of said Cravens within six months after default, on May 11th, 1891, or at any time; that defendant, upon the death of said Cravens, offered to waive the failure to make such demand, and tendered plaintiff and still tenders the amount of said paid-up policy, to wit, $2,670, which she declined and still declines to receive.

13. At the date of the issuance of said policy the only statute of

the State of New York regulating or in any way relating to
24 the forfeiture of life-insurance policies is that set forth in chapter 341 of the Laws of 1876 of the State of New York as amended by chapter 321 of the Laws of 1877 of the said State; which said statutes may be referred to as set forth in full herein.

14. That the total number of policies issued during the year 1887 by defendant on the "non-forfeiting limited tontine policy plan, with fifteen-year tontine period," constituting the same tontine class with policy No. 250,213, issued to the residents of all States and countries wherein defendant did business, was five thousand one hundred and seventy-two (5,172), covering aggregate insurance of the sum of $20,154,981.00.

15. That said John K. Cravens, on the 11th day of May, 1891, was fifty-three years of age, and the term of temporary insurance procured at that date by three-fourths of the net value of the policy taken as a single premium for the amount written in the policy was six years and forty-six days from the 11th day of May, 1891, making said policy, if subject to said extended insurance, in force at the date of the death of the said Cravens.

16. The amount which plaintiff claims under said policy is the face of the policy, to wit, $10,000, less the amount of unpaid premiums, with interest thereon, leaving a balance of $8,749.21, with interest thereon, at the rate of six per cent. per annum, from the 30th day of November, 1892, and the defendant admits and offers to pay the aforementioned sum of $2,670, which the plaintiff declines to receive.

17. That since the first day of January, 1879, the following-named foreign corporations have maintained and now maintain offices and agents in the State of Missouri and conduct in said State the business of insuring human lives for a money consideration, to
wit, the Mutual Life Insurance Company of New York; the
25 New England Life Insurance Company of Boston, Mass.; the Penn Mutual of Philadelphia, the Connecticut Mutual of Hartford, Conn.; the Equitable Life Assurance Society of New York.

18. That the Equitable Life Assurance Society of New York is a corporation organized under the general insurance laws of New York, passed June 24th, 1853, and under the charter granted thereunder, a copy whereof is hereto attached as "Exhibit F," and said society in the transaction of its business of insuring human lives issues different forms of policies, embodying different and varying plans of insurance on the mutual plan, for the benefit of the policy-holders, subject to the expense of management and the rights of stockholders, as set forth in said charter, and that said Equitable Life Assurance Society since the first day of January, 1879, has been and now is engaged in the business of insuring human lives through branch offices situated in the different States and Territories of this country.

19. The parties hereto shall be entitled to object to the admission of any one or more of the foregoing facts in evidence on the ground of irrelevancy or immateriality, provided that such objection shall be made in writing at the time of arguing or submitting the case

upon briefs, and to save exceptions to the ruling of the court thereon with the same effect as if evidence of such facts were offered at the trial.

WILLIAM B. C. BROWN AND
KARNES, HOLMES & KRAUTHOFF,
Attorneys for Plaintiff.
JUDSON & TAUSSIG, *For Defendant.*

EXHIBIT D.

No. 250,213. Amount, $10,000.

26

Age, 49.

Annual premium, $589.50.

Examined.

Wife's policy.

Limited-payment life.

Non-forfeiting tontine policy.

N. 86–37.

27

The New York Life Insurance Company, by this policy of insurance, in consideration of the agreements, statement-, representations and warranties submitted to its officers at the home office in the city of New York, in the written application for this policy, which are hereby referred to and made a part of this contract, and in further consideration of the sum of five hundred and eighty-nine dollars and fifty cents, to them in hand paid, at the office of the company in the city of New York, by the assured under this policy, to wit:

Fanny Cravens, wife of John K. Cravens, and of the annual payment of five hundred and eighty-nine dollars and fifty cents, to be made at said office on or before the eleventh day of May in every year during the continuance of this policy, until fifteen full years' premiums shall have been paid, doth insure the life of John K. Cravens, lawyer, of Kansas City, in the county of Jackson, State of Missouri (hereinafter called the insured) in the amount of ten thousand dollars, commencing on the eleventh day of May, 1887, at noon.

And the said company doth hereby promise and agree to pay the amount of the said insurance at its office in the city of New York to the said assured, for her sole use, if living, in conformity with the statute, and if not living to the children of said Fanny Cravens or their guardian for their use, or if there be no such children surviving, then to the executors, administrators or assigns of the said insured, upon receipt and approval at said office of proofs, as hereinafter required, of the death, during the continuance of this policy, of the said insured, deducting therefrom all indebtedness to the company, together with any balance of the year's premium remaining unpaid.

This policy is issued and accepted upon the following express conditions and agreements:

First. That if the premiums are not paid, as hereinafter provided, on or before the days when due, then this policy shall become void, and all payments previously made shall be forfeited to the company, except that if this policy, after being in force three full years, shall lapse or become forfeited for the non-payment of any premium, a paid-up policy will be issued on demand within six months after such lapse with the surrender of this policy, under the same conditions as this policy except as to payments of premiums, but without participation in profits, for an amount equal to as many fifteenth parts of the sum above insured as there shall have been complete annual premiums paid hereon when said default in the payment of premium shall be made; and all right, claim or interest arising under statute, or otherwise, to or in any other paid-up policy or surrender value, and to or in any temporary insurance, whether required or provided for by the statute of any State, or not, is hereby expressly waived and relinquished.

Second. That the provisions, requirements and
28 benefits, printed or written by the company upon the next page of this policy, are a part of this contract, as fully as if they were recited at length over the signatures hereto affixed.

In witness whereof, the New York Life Insurance Company has by its president and vice-president, or actuary, signed and delivered this contract, this eleventh day of May one thousand eight hundred and eighty-seven.

WM. H. BEERS, *President.*

A. H. WELCH,
Actuary, 2d Vice-Pres't.

Provisions and Requirements Referred to in This Policy.

Non-forfeiting limited tontine policy provision.

This policy is issued on the non-forfeiting limited tontine policy plan, the particulars of which are as follows:

That the tontine dividend period for this policy shall be completed on the 11th day of May, in the year nineteen hundred and two.

That no dividend shall be allowed or paid upon this policy unless the person whose life is hereby insured shall survive until completion of its tontine dividend period, and unless this policy shall then be in force.

That surplus or profits derived from such policies on the non-forfeiting limited tontine policy plan as shall not be in force at the

date of the completion of their respective tontine dividend periods, shall be apportioned among such policies as shall complete their tontine dividend periods.

That after the completion of the tontine dividend period, provided this policy shall not have previously terminated, this policy shall secure to the person whose life is hereby insured one of the following benefits:

First. To apply the accumulated dividend to the purchase of an annuity on the said person whose life is hereby insured in one of the following forms: A. An annuity for the number of years that premiums are payable beyond the tontine period, to be used in reduction of the subsequent premiums on this policy, and in case the amount accruing in any year from the annuity, together with dividends that may thereafter be declared on this policy, shall exceed the amount of premium due thereon, the excess to be paid in cash; or, B, if the payment of premium is completed, an annuity for the whole term of life.

Second. To continue the policy for the original amount and withdraw the accumulated surplus apportioned by the company to this policy in cash.

Third. To withdraw in cash the entire equity (that is, the net reserve computed by the American table of mortality and interest at four and one-half per cent., and in addition thereto the accumulated surplus aforesaid.

Fourth. To convert the entire equity into a paid-up policy without participation in profits, for an amount to be determined by the method then in use by the company in determining paid-up policies of this class; provided that, should the amount of such paid-up policy exceed the original amount of the insurance, it is made a condition precedent to its issue:

1st. That a medical examination of the party whose life is hereby insured, made by an approved examiner upon a blank provided by the company for that purpose, is furnished by the applicant at his own expense.

2nd. That such a medical examination is approved by the medical board at the home office of the company, and the risk is recommended by them; and,

3rd. That this policy is legally surrendered during the lifetime of the insured, and within ninety days from the termination of the tontine dividend period.

Fifth. The conversion of the entire equity into a life annuity, upon the life of and payable to the said person whose life is hereby insured. These benefits are at the option of the person whose life is hereby insured, but it is understood and agreed that not less than three months prior to the termination of the tontine period the said person whose life is hereby insured shall notify the company, in writing, which benefit is selected, and if no such notification shall be received, then, and in that case, the accumulated surplus shall be applied to the purchase of an annuity in one of the forms stipulated in the "first benefit" named above.

That in the payment of premiums upon this policy, falling due

within the selected tontine period, a grace shall be allowed of one month; provided that in all cases when this grace is availed of, a fine at the rate of ten per cent. per annum shall be paid to the company for the time deferred.

Limit of travel and residence—Occupation and employments—Dueling, violation of law, etc.

If the person whose life is hereby insured shall travel or reside beyond the settled limits or the protection of the Government of the United States (excepting in the settled limits of the Dominion of Canada, Prince Edward's island, or Newfoundland); or, between the first day of July and the first day of November, south of a line beginning at the point of intersection of the northerly boundary of North Carolina with the Atlantic coast; thence running westerly along the said northerly boundary to a point one hundred miles from the coast; thence in a southwesterly direction *containing* one hundred miles from said coast to the thirty-fourth parallel of latitude; thence westerly along said parallel to the westerly border of Alabama (excepting the city of Atlanta and an area within a radius of fifty miles around it); thence northerly along the westerly border of Ala-
31 bama and along the Tennessee river to the northerly boundary of Tennessee; thence westerly along the nor*ht*erly boundary of Tennessee and Arkansas, extended to the ninety-seventh degree of west longitude; thence southerly to the thirty-second parallel of north latitude; thence westerly along the said parallel to the Pacific ocean; or, shall enter upon a voyage upon the high seas (except as hereinafter specified); or, shall be personally engaged in blasting, mining, submarine operations, areonautic travel or excursions, or the manufacture or transportation of highly imflammable or explosive substances; or in working or managing a steam-engine in any capacity; or, as a mariner, engineer, fireman, conductor, express messenger, or laborer in any capacity upon service on any sea, inlet, sound, river, lake or railroad; or shall enter any military or naval or paid fire department service whatsoever (the malitia, when not in actual service, excepted), without the consent of this company in each or either of the foregoing cases previously given in writing; or, if he shall die in or in consequence of a duel, or the violation of the laws of any nation, State or province; or, if death shall be caused by or in consequence of the use of intoxicating drink, opium, or other narcotics; or, if the first premium herein shall not have been actually paid during the continuance of the life in the same condition of health as described in the application; or, if any of the statements or representations made in the application for this policy shall be found in any respect untrue; then, and in every such case, this policy shall be null and void, and all payments previously made shall be forfeited to the company, and no action or right of action shall remain to, or be maintained against the company, by the assured or any other person by virtue of this policy.

Traveling Privileges.

The person whose life is hereby insured has permission to pass as passenger, by direct route, in first-class vessels, as fol-
32 lows:

1st. To and from Europe, travel and residence wherein is hereby permitted; 2nd, to and from California, and along the coast of Nova Scotia, New Brunswick, and the United States, between Cape Canso and the Rio Grande (provided no port is entered in which residence, at the time of such entrance, is prohibited); 3rd, between ports on the east Pacific coast, north of 32 degrees of north latitude; 4th, between ports on the east Pacific coast, north of 32 degrees of north latitude, and ports in the Sandwich islands, China and Japan.

Statements, etc., in the Application.

Inasmuch as only the officers of the home office of the company in the city of New York have authority to determine whether or not a policy shall issue on any application, and as they act on the written statements and representations made in the application for this policy, it is expressly understood and agreed that no information, statements or representations made or given by or to any other person soliciting or taking the application for this policy, or by or to any other person, shall be binding on the company, or in any manner effect its rights, unless such information, statements, or representations have been reduced to writing, and presented to the officers of the company at the home office, in the application referred to.

Powers of Agents.

No agent has power in behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to waive any forfeiture, to issue a permit for residence, travel or occupation, or to bind the company by making any promise or receiving any representation or information. This power can be exercised only by the president, vice-president or actuary of the company, and will not be delegated.

Payment of Premises.

All premiums are due and payable at the home office of
33 the company unless otherwise agreed in writing, but may be paid to agents producing receipts signed by the president, vice-president or actuary, and countersigned by such agents. Notice that each and every payment of premium is due at the date named in the policy if given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is hereby expressly waived. The giving of any other notice or the acceptance of any premium after it is due, *it* is to be considered as an act of courtesy only, and shall not be deemed as establishing a custom, or as waiving or disturbing any of the conditions as to payments of premiums thereafter due.

Dividends.

In case the cash value of any dividend that may be declared to this policy is allowed, the receipt therefor of the person whose life is hereby insured shall be a valid release to the company.

Proofs of Death.

Proofs of death under this policy shall be furnished to the company at its office in the city of New York within one year after death, and shall include sworn statements on the company's forms, as follows:

(1) A statement of each claimant; (2) a statement of each physician who attended the deceased within a year before death; (3) a statement from a responsible householder who knew the deceased; (4) a statement from the undertaker; (5) a statement from the clergyman, whenever one officiates. All questions must be fully answered, and the omission of any of the answers or statements required must be satisfactorily explained or supplied by other proofs.

Assignments.

This policy is not assignable.

EXHIBIT C.

34 *Abstract (E. & O. E) of the Application for Insurance in the New York Life Insurance Company.*

Policy No. 250,213.

* * * * * * *

1. Name (in full) of the party on whose life insurance is applied for. John K. Cravens.

2. A. Present residence. Kansas City, county of Jackson, State of Missouri. B. Post-office address. No. 22 Underwriters' Exchange, Kansas City, Missouri.

3. Occupation or employment; if more than one, state all. Lawyer.

NOTE.—In giving the occupation of the party it is not sufficient to state (for example) that he is a merchant, mechanic, or clerk, but the particular branch of business or trade must be specified, and full particulars given where the occupation is in any way hazardous.

4. How long has the party been engaged in the present occupation? 25 years.

B. Is the party married? Yes.

5. A. Place of birth. Indiana.

B. Race or nationality. White.

C. Born on the 14 day of August, 1838; age, nearest birthday, 49.

6. A. Are the habits of the party at the present time and have they always been sober and temperate? Yes.

B. To what extent does the party use intoxicating drinks as a beverage? Occasionally.

C. Is the party now or has he ever been engaged in any way in the retailing of alcoholic liquors? No.

7. A. Is the party now insured in this company or has he ever been? No.

B. If so, state the numbers of policies and amounts. ——.

35 8. A. Has the party any other insurance on his life?

B. If so, state in what companies, when taken, the kinds of policies, and their respective amounts.

A. B. Equitable, $10,000; Mutual Life, $2,500; New England, $3,000; assessment, $22,500.

9. A. Has any proposal or application to insure the life of the party ever been made to any company or agent upon which a policy has not been issued, or upon which a policy has been issued at a higher rate than that applied for? No.

B. If so, state full particulars, to what company, when, &c. ——.

10. Where has the party resided (during the summer and winter) during each of the last ten years? Kansas City.

11. Name of an intimate friend. L. K. Thacher.

B. His P. O. address. Kansas City.

12. Sum to be insured. $10,000.

Premiums, how payable—annually, semi-annually, or quarterly? On what table? Life, 15 premium.

13. Name in full, residence, and occupation of the party to whom the insurance applied for is to be payable in the event of death, and relationship to the party on whose life the insurance is applied for? Fanny Cravens, wife.

14. If the insurance is to be for the benefit of the wife, state whether in the event of her death before that of the insured it is to be payable to her executors, administrators, or assigns, or whether it is to revert to the insured or to revert to children? State whether her children, his children, or children by her are meant. Her children.

NOTE.—In view of legal difficulties, the company cannot recognize any assignment of a policy written in favor of wife with reversion to children; nor can it place a cash surrender value on such a policy while in force (except at the end of the tontine

36 period).

15. If the application is for and endowment policy, to whom is the endowment to be payable at its maturity?

NOTE.—This question refers only to policies issued on the endowment premium tables; not to policies issued on any life table (even if tontine).

16. Is a policy desirable on the "non-forfeiting limited tontine policy" plan, as set forth in that policy form? (Yes or no.) Yes.

B. If so, is the tontine period to be ten, fifteen, or twenty years?

B. The tontine period is to be fifteen years.

17. Any policy issued under this application will contain an agreement that—

If it shall lapse or become forfeited for the non-payment of any premium after being in force three full years, a paid-up policy will be issued on demand made within six months after such lapse, with surrender of the policy, under the same conditions as this policy,

except as to payments of premiums, but without participation in profits, for such an amount as the net reserve on the policy at the time of lapse, *for such an amount as the net reserve on the policy at the time of lapse*, computed by American table of mortality, and interest at four and one-half per cent., after deducting all indebtedness to the company, will purchase as a single premium at the present published rates of the company at the age of the insured at the time of lapse, if an ordinary life policy, or for such an amount as shall be represented by as many proportional parts of the sum insured as there shall have been complete annual premiums paid thereon when the lapse or default above referred to shall first be made if a limited-payment life policy or an endowment policy.

In consideration of this agreement, is all right, claim, or interest to or in any temporary insurance, surrender value, or other
37 paid-up policy, whether required or provided for by the statute of any State or not, specifically waived and relinquished? Yes.

NOTE.—An affirmative answer to this question is a necessary condition to the issue of the policy.

I do hereby declare that the person above named, on whose life insurance is applied for, is now in good health, and does ordinarily enjoy good health, and that in the above application I have not withheld any circumstance or information touching the past or present state of health or habits of life of said person with which the New York Life Insurance Company ought to be made acquainted (and that I have an interest in the life of the said person to the full amount of the sum hereby applied for). And I do hereby agree as follows:

1. That the statements and representations contained in the foregoing application and declaration, together with those made to the medical examiner by the person above named, on whose life insurance is applied for, shall be the basis of the contract between me and the said company; that I hereby warrant the same to be full, complete, and true, whether written by my own hand or not, and if the same or any of them are in any respect untrue the policy which may be issued hereon shall be void, and all moneys which may have been paid on account of such insurance shall be forfeited to said company.

2. That inasmuch as only the officers of the home office of the company in the city of New York have authority to determine whether or not a policy shall issue on any application, and as they act on the written statements and representations referred to, no statements, representations, or information made or given by or to the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on the company, or in any manner affect its rights, unless such statements, representations,
38 or information be reduced to writing and presented to the officers of the company at the home office in the application and declaration above referred to.

3. That in any distribution of surplus the principles and methods

which may be adopted by the company for such distribution and its determination of the amount equitably belonging to any policy which may be issued under this application shall be, and are hereby ratified and accepted by and for every person who shall have or claim any interest under the contract now proposed.

4. That under no circumstances shall the policy hereby applied for be in force until the actual payment to and acceptance of the premium by the company or its authorized agent during the lifetime and good health of the person on whose life insurance is applied for.

5. That the whole or any part of the risk herein proposed may be reinsured.

6. That the entire contract contained in the said policy and in this application, taken together, shall be construed and interpreted as a whole and in each of its parts and obligations according to the laws of the State of New York, the place of the contract being expressly agreed to be the principal office of the said company, in the city of New York, and, unless otherwise mutually agreed in writing, no suit shall be brought against the company upon this policy except in the courts of that State or in the circuit or district courts of the United States, nor shall any such suit be brought after the lapse of one year from the time when the cause of action accrues.

Dated at Kansas City this 2nd day of May, 1887.

Signature of the party or parties for whose benefit the insurance is to be effected. (Write the names in full.)

FANNY CRAVENS,
By JOHN K. CRAVENS.

Witness:

39 —— ——, *Agent.*

86–23.

NOTE.—In case of husband and wife or parent and children the former may sign for the latter, thus:

MARY SMITH,
By JOHN SMITH.

Signature of the party on whose life insurance is applied for. (Write the names in full.)

JOHN K. CRAVENS.

These blanks must be filled up by the medical examiner and in his own handwriting:

Declarations Made to the Medical Examiner of the New York Life Insurance Company.

The applicant for insurance must answer the following questions, which will be asked him by the medical examiner. The answers form an essential part of the contract.

1. Have you had since childhood any of the following complaints:

Answer (yes or no) opposite each.

Apoplexy. No. Asthma. No. Bilious colic. No.

Bronchitis. No. Cancer. No. Dropsey. No.

Disease of the brain. No. Disease of heart. No. Disease of kidney-. No. Disease of liver. No.

Disease of lungs. No. Disease of urinary organs. No.

Fistula. No. Fits or convulsions. No. General debility. No.

Gout. No. Insanity. No. Jaundice. No. Palpitation. No.

Paralysis. No. Piles. No. Pleurisy. No. Pneumonia. No.

Rheumatism. No. Rupture. No. Scrofula. No. Smallpox. Yes.

Skin disease. No. Spinal disease. No. Spitting or raising blood. No. Syphilis. No. Yellow fever. No.

Give full particulars of any illness you may have had since childhood. Had smallpox in 1871. Had typhoid fever in 1876; was sick some four or five weeks.

40 When were you last confined to the house by illness? In 1876; typhoid fever.

2. Have you ever had severe headaches, vertigo, fits, or any nervous or muscular trouble? No.

3. A. Are you subject to cough, expectoration, palpitation, or difficulty in breathing? No.

B. Have you ever been? If so, to which, when, and full details. No.

4. Are you subject or predisposed to dyspepsia, dysentery, or diarrhœa? No.

5. Have you ever met with any accidental or serious personal injury?

A. No.

6. Have you ever been seriously ill; if so, when, with what, and who was the medical attendant (state his name and residence)? Yes. Smallpox, in 1871; Dr. Porter, K. C.; typhoid fever, in 1876; Dr. Schauffler, K. C.

7. A. Name and residence of your usual medical attendant.

B. When and for what have his services been required? No regular attendant, only as above stated.

8. Have you consulted any other medical man; if so, when and for what? No.

9. Has any proposal or application to insure you- life ever been made to any company or agent upon which a policy has not been issued? If so, state full particulars. No.

10. Has any physician given an unfavorable opinion upon your life with reference to life insurance? If so, state particulars. No.

11. The medical examiner will please obtain from the party answers in full detail to the following queries. (In giving cause of death avoid all indefinite terms, as "general debility," "change of life," "fever," "dropsy," "exposure," or "accident." If the

41 word "childbirth" is used, state how long after the delivery death occurred, and whether there were any symptoms of disease of the lungs.)

Age, if living.	Condition of health.	Age at death.	Cause of death.	How long ill.	Previous health.
Father		74	Old age	Short time.	Good.
Mother, 85	Good				
5 brothers 58	Good				
5 brothers 54					
5 brothers 43					
5 brothers		About 50	Apoplexy.	Few hours.	Good.
5 brothers		Infancy			
2 sisters		About 30	Facts unknown.		Good.
Father's father		75	Old age	Sh'rt time.	Good.
Father's mother		94	Old age	Sh'rt time.	Good.
Mother's father		Don't know.	Drowned.		Good.
Mother's mother		Don't know.	Drowned.		Don't know.

12. Has either of your parents, brothers, sisters, grandparents, uncles, or aunts now or ever had consumption, cancer, gout, scrofula, diabetes, rheumatism, epilepsy, insanity, or other hereditary disease? No.

B. If so, give full particulars of each case.

I hereby declare that I am the party described in the accompanying application signed by me, and that I have given true answers to all the questions put to me by the medical examiner, which questions and answers are considered as an essential part of the application, and as forming with it the basis of the proposed contract of insurance.

To be signed by the party whose life is proposed for insurance.

JOHN K. CRAVENS.

Signed before me this 6th day of May, 1887.

CHARLES H. LESTER, M. D.,
Medical Examiner.

86–24.

42 Received from the New York Life Insurance Company — dollars, as per memorandum below, in full for all claims and demands under this policy, on the life of —— ——, and which is hereby surrendered to the company for cancellation.

$—.

On the back of the policy the following appears:

No. 250,213.

New York Life Insurance Company.

Assurance on the life of John K. Cravens.

Amount, $10,000.

For the information of the assured, and in order that any unintentional errors or omissions which hereafter may be found to exist may be corrected, an abstract of the application upon which this policy is based may be found on the third page within.

If corrections are desired, when satisfactory to the company, a certificate to that effect will be issued over the signature of the president or actuary.

D. M. HALBURT & SON, *Agent.*

This was all the evidence offered.

Whereupon plaintiff then and there at the time objected in writing to paragraphs five (5), twelve (12), thirteen (13), fourteen (14), and the following words contained in paragraph one (1), "as a mutual life insurance company without capital stock," contained in the agreed statement of facts hereinbefore set out, on the ground of irrelevancy to the issues in this cause; which objection was by the court overruled; to which action of the court in overruling said objection plaintiff then and there at the time excepted.

Whereupon the court found the issue for the defendant and gave judgment for the plaintiff in the sum of two thousand six hundred and seventy dollars ($2,670.00), and upon the seventeenth
43 day of April, 1894, and within four days after said finding and judgment and at the same term of court plaintiff filed her motion for a new trial as follows, to wit:

Comes now Fannie Cravens, plaintiff in the above-entitled cause, and files this her motion for new trial for the reasons that:

First. The finding and judgment of the court were contrary to the facts.

Second. The finding and judgment of the court are contrary to law.

Third. The finding and judgment of the court upon the agreed statement of facts should have been in favor of the plaintiff in the sum of nine thousand four hundred and thirty-two dollars and thirty-three cents ($9,432.33)—that is to say, the sum of $8,749.21, with interest thereon, at the rate of six per cent. per annum, from the 30th day of November, 1892.

Fourth. The court erred in considering improper evidence objected to by the plaintiff.

Which said motion was by the court, on the 23rd day of June, 1894, overruled; to which ruling and order of the court plaintiff then and there at the time excepted.

Upon the seventh day of June, 1894, the defendant filed in said cause its motion to retax costs as follows, to wit:

Now comes said defendant and moves the court to retax costs in said cause for the reason that judgment was rendered in favor of the plaintiff for costs, whereas judgment should have been rendered in favor of the defendant for costs, it having been admitted on the trial of said cause that defendant had tendered the plaintiff prior to the commencement of suit and has at all times been
44 ready and willing to pay to the plaintiff the amount for which judgment was rendered in said cause. Defendant therefore asks that costs of said suit be taxed against plaintiff.

Which said motion was by the court, on the 23rd day of June, 1894, sustained; to which ruling and order of the court the plaintiff then and there at the time excepted.

Plaintiff therefore prays the court to allow and sign this bill of exceptions, and that the same may be signed, sealed, and made a part of the record in this cause, which is accordingly done this 8th day of October, 1894.

J. H. SLOVER, [SEAL.]
Judge of the Circuit Court of Jackson County, Missouri, Division No. 2.

STATE OF MISSOURI, } ss:
County of Jackson, }

I, Morris E. Jones, official stenographer of the circuit court of Jackson county, Missouri (for division No. 2 thereof), do certify that the foregoing is a full, true, and complete copy of the bill of exceptions in cause numbered 18840, entitled Fannie Cravens *vs.* The New York Life Insurance Company, as the same now remains on file in the office of the clerk of said court.

In witness whereof I have hereunto set my hand this 8th day of October, 1894.

MORRIS E. JONES,
Official Stenographer.

STATE OF MISSOURI, } ss:
County of Jackson, }

45 I, H. H. Noland, clerk of the circuit court of Jackson county, State of Missouri, do hereby certify that the foregoing is a full and complete transcript of the cause wherein Fannie Cravens is plaintiff and The New York Life Insurance Company, a corporation, is defendant, as fully as the same appears of record and on file in my office, and that a copy of the bill of exceptions, as furnished by the official stenographer of this court, is inserted herein.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at office, in Kansas City, Missouri, this 17th day of October, A. D. 1894.

[SEAL.]

H. H. NOLAND, *Clerk,*
By D. M. McCLANAHAN, *D. C.*

46 And afterwards, to wit, on the 23rd day of October, 1896, the following proceedings were had in said cause in division No. 1 of said court, to wit:

FANNIE CRAVENS, App., }
vs.
N. Y. LIFE INS. CO., Resp. }

Come now the said parties, by attorneys, and after argument herein submit these cases to the court.

And afterwards, to wit, on the 1st day of April, 1898, the further following proceedings were had in said cause, viz:

FANNIE CRAVENS, App.,
vs.
N. Y. LIFE INS. Co., Resp.

Now, at this day, upon the court's own motion, it is ordered that these causes be transferred to the court in banc and set for hearing May 4, 1898.

And afterwards, to wit, on the 4th day of May, 1898, the following proceedings were had in said cause in court in banc, viz:

FANNIE CRAVENS, App.,
vs.
N. Y. LIFE INS. Co., Resp.

Come now the said parties, by attorneys, and after argument herein submit these causes to the court.

And afterwards, to wit, on the 21st day of February, 1899, the further following proceedings were had in said cause, viz:

FANNIE CRAVENS, Appellant,
vs.
THE NEW YORK LIFE INSURANCE Company, Respondent, a Corporation. } Appeal from Jackson County Circuit Court.

47 Now, at this day, come again the parties aforesaid, by their respective attorneys, and the court here, being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Jackson county circuit court rendered, be reversed, annulled, and for naught held and esteemed, and that the said appellant be restored to all things which she has lost by reason of the said judgment. It is further considered and adjudged by the court that the said cause be remanded to the said Jackson county circuit court for further proceedings to be had therein, in conformity with the opinion of this court, herein delivered, and that the said appellant recover against the said respondent her costs and charges herein expended, and have therefor execution (opinion filed).

Which said opinion is in words and figures as follows, to wit:

48 In the Supreme Court of Missouri, in Banc, October Term, 1898.

FANNY CRAVENS, Appellant,
vs.
THE NEW YORK LIFE INSURANCE COMPANY, Respondent.

In banc.

This is a suit upon a policy of life insurance for ten thousand dollars issued by the defendant company upon the life of J. K. Cravens, deceased, in favor of the plaintiff, who was his wife. The

case was tried by the court, a jury being waived. There was judgment in favor of plaintiff in the sum of $2,670, from which, after an unsuccessful motion for a new trial, she appeals, claiming that she is entitled to recover the sum of $8,749.21—that is, the face of the policy, $10,000, less the two unpaid premiums which were due at the time of the death of the assured, together with interest thereon.

The petition alleges that the policy was issued on the 11th day of May, 1887; the payment of all annual premiums until May, 1891; the death of the assured on November 2, 1892; that under the statute the insurance was extended and was in force at the date of the death of the assured, and asks judgment for the amount of the policy, less the unpaid premiums.

The answer of defendant alleges that it is a mutual insurance company duly incorporated under the laws of the State of New York and doing business in this State; that by agreement of the parties the law of that State was made the law governing the contract; set up that the assured made default in May, 1891, after paying four annual premiums, and tendered the sum of $2,670.00, the amount of paid-up or commuted policy, to which the original policy was entitled by its terms on such default, waiving failure to make demand therefor. It also alleges that other policy-holders—that is, other members of the same tontine class—had, by the terms of their respective policies, acquired, with plaintiff, contingent and mutual interests in the profits and surplus to be derived from the premiums on all policies of such class, and that the company, on the faith
49 of plaintiff's contract, had incurred obligations to the other members of the tontine class, and that plaintiff is now estopped from setting up any other or different claim under the policy.

The answer further alleges that if the statute of Missouri relied on by plaintiff was construed so as to nullify the non-forfeiting agreement upon the faith of which the policy was issued and without which it would not have been issued, and to create and enforce an obligation contrary to the expressed intent of the parties, that then the statute so construed is repugnant to the constitution of Missouri and to the Constitution of the United States.

The application for the policy is made part of the contract and contains the following provisions:

"2. That inasmuch as only the officers of the office of the said company in the city of New York have authority to determine whether or not a policy shall issue on any application, and as they act on the written statements and representations referred to, no statements, representations, promises, or information made or given by or to the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on said company, or in any manner affect its right, unless such statements, representations, or information, be reduced to writing and presented to the officers of the company, at the home office in the application." * * *

4. That under no circumstances shall the policy hereby applied for be in force until the actual payment to and acceptance of the premium by the company or its authorized agent during the life-

time and good health of the person on whose life insurance is applied for.

6. That the entire contract contained in the said policy and in this application, taken together, shall be construed and interpreted as a whole and in each of its parts and obligations, according to the laws of the State of New York, the place of the contract being expressly agreed to be the principal office of the said com-
50 pany in the city of New York.

The policy contains this further provision:

That if the premiums are not paid, as hereinafter provided, on or before the days when due, then this policy shall become void, and all payments previously made shall be forfeited to the company, except that if this policy, after being in force three full years, shall lapse or become forfeited for the non-payment of any premium, a paid-up policy will be issued, on demand made within six months after such lapse with the surrender of this policy, under the same conditions as this policy except as to payments of premiums, but without participation in profits, for an amount equal to as many fifteenth parts of the sum above insured as there shall have been complete annual premiums paid hereon when said default in the payment of premiums shall be made; and all right, claim or interest arising under statute, or otherwise, to or in any other paid-up policy or surrender value, and to or in any temporary insurance, whether required or provided for by the statute of any State, or not, is hereby expressly waived and relinquished.

The cause was tried upon an agreed statement of facts, the material parts of which are as follows:

1. That the defendant is a corporation organized and existing under the laws of the State of New York as a mutual life insurance company, without capital stock, having its chief office in the city of New York, and was at the date of issuing the policy in question and since has been and now is engaged in the business of insuring lives through branch offices situated in the different States and Territories of this country and certain foreign countries.

2. That the defendant for many years past has maintained branch offices in the State of Missouri, and has employed agents to solicit applications for insurance from citizens of Missouri, and in the year 1887, as both prior and subsequent thereto, defendant had received from the superintendent of insurance a certificate of authority to transact business in said State.

51 3. That during the year 1886 and prior to the issuance of the policy sued upon the amount of policies issued by defendant to citizens of Missouri was $1,617,985.00, and the amount of insurance in force on the lives of citizens of Missouri on December 31, 1886, was $8,886,542.00, and the total amount of policies issued by defendant in said year 1886 was $85,178,294.00, and the total amount of policies in force on December 31, 1886, issued by defendant was $304,373,540.00.

4. That on the second day of May, 1887, and long prior thereto John K. Cravens was a citizens of the State of Missouri and resident of the county of Jackson, in said State; that on the said date and

long prior thereto said John K. Cravens was the husband of Fannie Cravens, the plaintiff herein, and thereafter continued to be the husband of said plaintiff, Fannie Cravens, until the time of his death.

5. That the defendant in the transaction of its business had adopted different forms of policies, embodying different and varying plans of insurance, all of them being on the mutual plan, the premiums paid, less the expense of management, being administered solely for the benefit of the policy-holders, defendant having no capital stock.

6. That on the second day of May, 1887, the local agents of defendant solicited said John K. Cravens, at his residence, in the county of Jackson and State of Missouri, to insure his life in the defendant company, and submitted to him the different plans of insurance then in use by said defendant, and said John K. Cravens selected the plan known as the non-forfeiting, limited tontine policy, fifteen-year endowment, with limited premium return, tontine, signed a written application therefor, and also signed the same in the name of the plaintiff, Fannie Cravens, as beneficiary of the policy to be issued thereunder; which said application is herewith filed * * * and made a part hereof as fully as if set forth herein. Said written application was thereupon delivered to defendant's agent at Kansas City, and was by him forwarded
52 with the report of the medical examination of said Cravens; which said medical examination of said Cravens was made by the examiner of defendant company at Kansas City, in the State of Missouri, and by said agent forwarded to defendant's home office, in the city of New York.

7. That thereafter, on the 10th day of May, 1887, said application and medical examination was received at the home office of the defendant, in the city of New York, State of New York, and was there examined by the officers of defendant, and on the 11th day of May said application and medical examination was accepted and approved, and the policy in suit, No. 250,213, was thereupon executed by the officers of said defendant at said home office; which said policy is herewith filed * * * and made a part hereof as fully as if set forth herein.

8. That said policy was transmitted by defendant to its agents at Kansas City, in Jackson county, and on the 20th day of May, 1887, the policy was delivered to said Cravens, in the county of Jackson, in the State of Missouri, by said agent, and the first premium of $589.50 was paid by said Cravens, in the State of Missouri, to the said agent of defendant and by said agent transmitted to defendant's home office.

9. That said Cravens thereafter paid to defendant the premiums due upon said policy upon the 11th day of May, 1888, and on the 11th day of May, 1889, and on the 11th day of May, 1890, the amount of each of said premiums being received by the agent of the defendant from said Cravens at defendant's branch office in Kansas City and transmitted to defendant's home office, said agent delivering there-

for to said Cravens receipts of defendant, signed by the chief officers of the company and countersigned by said agent.

10. That default was made in the payment of the premium due on the 11th day of May, 1891, and said premium has not been paid, and no subsequent premium has been paid.

53 11. That said John K. Cravens died in Kansas City, in the State of Missouri, on the second day of November, 1892, and thereafter, on the 30th day of November, 1892, proofs of death in due form, as called for by the policy of insurance, were by Fannie Cravens made out and delivered to defendant and received by defendant. A copy of said proofs of death is herewith filed * * * and made a part hereof as fully as if set forth herein.

12. That the amount of paid-up insurance to which the policy in suit, No. 250,213, was entitled according to the terms of the application and policy was $2,670; that no demand for such paid-up policy was made by or on behalf of said Cravens within six months after default, on May 11, 1891, or at any time; that defendant, upon the death of said Cravens, offered to waive the failure to make such demand, and tendered plaintiff and still tenders the amount of said policy, to wit, $2,670, which she declined and still declines to receive.

13. At the date of the issuance of said policy the only statute of the State of New York regulating or in any way relating to the forfeiture of life insurance is that set forth in chapter 341 of the Laws of 1876 of the State of New York as amended by chapter 321 of the Laws of 1877 of the said State; which said statutes may be referred to as if set forth in full herein.

14. The total number of policies issued during the year 1887 by defendant on the "non-forfeiting, limited tontine policy plan, with fifteen years' tontine period," constituting the same tontine class with policy No. 250,213, issued to the residents of all the States and countries wherein defendant did business, was five thousand one hundred and seventy-two (5,172), covering aggregate insurance in the sum of $20,154,981.00.

15. That said John K. Cravens on the 11th day of May, 1891, was fifty-three years of age, and the term of temporary insurance procured at that date by three-fourths of the net value of the policy taken as a single premium for the amount written in the policy was six years and forty-six days from the 11th day of May,

54 1891, making said policy, if subject to said extended insurance, in force at the date of the death of the said Cravens.

16. The amount which plaintiff claims under said policy is the face of the policy, to wit, $10,000, less the amount of unpaid premiums, with interest thereon, leaving a balance claimed of $8,749.21, with interest thereon, at the rate of six per cent. per annum, from the 30th day of November, 1892, and the defendant admits and offers to pay the aforementioned sum of $2,670, which the plaintiff declines to receive.

The several sections of the Revised Statutes of 1879 in force at the date of the policy sued on and having any bearing upon the issues involved are as follows:

"SECTION 5983. Policies non-forfeitable, when.—No policy of insurance on life hereafter issued by any life insurance company authorized to do business in this State, on and after the first day of August, A. D. 1879, shall, after payment upon it of two full annual premiums, be forfeited or become void by reason of the non-payment of premiums, thereon, but it shall be subject to the following rules of commutation, to wit: The net value of the policy when the premium become- due and is not paid shall be computed upon the American experience table of mortality, with four and one-half per cent. interest per annum, and after deducting from three-fourths of such net value any notes or other indebtedness to the company, given on account of past premium payments on said policy issued to the insured, which indebtedness shall then be cancelled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy; and the term for which such temporary insurance shall be in force shall be determined by the age of the person, whose life is insured at the time of default of premium, and the assumption of mortality and interest aforesaid, but if the policy shall be an endowment, payable at a certain time, or at death if it should occur previously then if what remains as aforesaid shall exceed the net single premium of temporary insurance for the remainder of the endowment term
55 for the full amount of the policy, such excess shall be considered as a net single premium, for a pure endowment of so much as such premium will purchase determined by the age of the insured at date of defaulting the payment of premium on the original policy, and the table of mortality and interest as aforesaid, which amount shall be paid at the end of the original term of endowment, if the insured shall then be alive.

"SEC. 5984. A paid-up policy may be demanded, when at any time after the payment of two or more full annual premiums and not later than sixty days from the beginning of the extended insurance provided in the proceding section the legal holder of the policy may demand of the company, and the company shall issue its paid-up policy, which in case of an ordinary life policy, shall be for such an amount as the net value of the original policy at the age and date of lapse, computed according to the American experience table of mortality, with interest at the rate of four and a half per cent. per annum, without deduction of indebtedness on account of said policy, will purchase, applied as a single premium upon the table rates of the company, and in case of a limited-payment life policy, or of a continued-payment endowment policy payable at a certain time, or death, it shall be for an amount bearing such proportion to the amount of the original policy as the number of complete annual premiums actually paid shall bear to the number of such premiums stipulated to be paid: Provided, that from such an amount the company shall have the right to deduct the net reversionary value of all indebtedness to the company on account of such policy; and, provided, further that the policy-holder shall, at the time of making demand for such paid-up policy, surrender the

original policy, legally discharged, at the parent office of the company.

"SEC. 5985. Rule of payment on commuted policy.—If the death of the insured occur within the term of temporary insurance covered by the value of the policy as determined in section 5983, and if no condition of the insurance other than the payment of
56 premiums shall have been violated by the insured, the company shall be bound to pay the amount of the policy, the same as if there had been no default in payment of premiums, anything in the policy to the contrary notwithstanding: Provided, however, that notice of the claim and proof of the death shall be submitted to the company in the same manner as provided by the terms of the policy, within ninety days after the decease of the insured; and, provided, also, that the company shall have the right to deduct from the amount insured in the policy the amount compounded at six per cent. interest per annum of all the premiums that had been forborne at the time of the decease, including the whole of the year's premium in which the death occurs, but such premiums shall in no case exceed the ordinary life premium for the age at issue, with interest as last aforesaid.

"SEC. 5986. The foregoing provisions not applicable, when.—The three preceding sections shall not be applicable in the following cases, to wit: If the policy shall contain a provision for an unconditional cash surrender value at least equal to the net single premium for the temporary insurance provided hereinbefore, or for the unconditional commutation of the policy to non-forfeitable paid-up insurance for which the net value shall be equal to that provided for in section 5984, or if the legal holder of the policy shall, within sixty days after default of premium, surrender the policy and accept from the company another form of policy, or if the policy shall be surrendered to the company for a consideration adequate in the judgment of the legal holder thereof, then, in any of the foregoing cases, this act shall not be applicable."

The plaintiff contends that the contract of insurance, which form the basis of this suit, is a Missouri contract and must be governed by its laws, notwithstanding the defendant is a corporation incorporated under the laws of the State of New York, has its chief office there, and that the contract provides that the contract con-
57 tained in the policy and application shall be construed according to the laws of the State of New York, the place of said contract being agreed to be the home office of said company in the city of New York. This contention is not only predicated of the fact that the contract also provides "that under no circumstances shall the policy hereby applied for be in force until the actual payment to and acceptance of the premiums by the company or its authorized agent during the lifetime and good health of the person on whose life insurance is applied for," but upon the further fact that the application was by defendant's agent in Kansas City, Missouri, transmitted to defendant at its home office in said city, upon receipt of which the company issued the policy containing the clause quoted, sent the same to its agent at Kansas City, who

afterwards delivered the policy to the insured in Missouri, and then and there received the first premium. However perfect in form the contract may have been, and although all of its other terms and conditions may have been complied with, payment of the premium during the life and good health of the assured and delivery of the contract to him were conditions precedent in order to complete its execution, and as if the premiums were paid and the policy delivered to the assured, in this State, it must follow that the contract was executed here.

Equitable Life Society *vs.* Clements, 140 U. S., 226, was a suit upon a life insurance policy executed in New York by a corporation of that State doing business in this State upon an application signed in this State by one of its residents and made part of the contract, which provided that it should not take effect until the first premium was actually paid during the life of the person proposed for insurance and which was delivered and the first premium paid in Missouri, and it was held, in the absence of evidence of the company's acceptance of the application in New York, to be a Missouri contract and governed by the laws of Missouri.

In Hicks *vs.* National Life Ins. Co., 60 Fed. Rep., 690, it is said:

"If any authority were needed for the proposition that a
58 policy applied for in New York, delivered there and the premiums paid there, is a New York contract, notwithstanding it is signed and issued by the insurer in another State, the reference is supplied by the case of Assur. Soc. *v.* Clements, 140 U. S., 226. The delivery of the policies in the present case was made in New York city to an agent of the assured and in legal effect was as if the assured had been personally present and received them. Then, and not before, the policies took effect."

In Northwestern Mut. Life Ins. Co. *v.* Elliott *et al.*, 5 Fed. Rep., 225, an application for a policy was made at Portland, Oregon, to the company's agent, who forwarded same to the company at Milwaukee, Wisconsin. The company thereupon, in Wisconsin, issued its policy containing a clause, viz:

"This policy shall not take effect and become binding on the company until the premium shall be actually paid during the lifetime of the person whose life is assured to the company or some person authorized to receive it, who shall countersign the policy on receipt of the premium," and transmitted same to its agent at Portland, Oregon, who there delivered it to the insured.

The court said: "Where, then, was this contract made; in Wisconsin or Oregon? The answer to this question involves the inquiry where did the final act take place which made the transaction a contract binding on the parties?

"The premium was paid to the agent of the plaintiff at Portland, who then and there countersigned and delivered the policy. This was the consummation and completion of the contract. But, to put this beyond a doubt, the policy itself declares that it shall not be binding on the company until these acts are performed, and until it was binding on the company it was not binding on the applicant; in short, it was not yet a contract, but only a proposition."

Pomeroy *vs.* Manhattan Life Ins. Co., 40 Ills., 400; Thwing *vs.* Great Western Ins. Co., 111 Mass., 109; Wood F. Ins., 189, note 2; Hardie *v.* St. Louis Mut. Life Ins. Co., 26 La. Ann., 242; St. Louis Mut. Life Ins. Co. *vs.* Kennedy, 6 Bush., 450.

59 In Fletcher *vs.* New York Life Ins. Co., 13 Fed. Rep., 526, the policy was delivered in Missouri to a citizen of Missouri and the first premium there paid. The court said:

"The defendant company was doing business in Missouri with the privileges granted to it here when said insurance was effected. It may be that the formal acceptance of the proposed contract was by the letter of the contract to be consummated in New York. The broad proposition, however, remains, no artifice to avoid which can be upheld. The statutes of Missouri, for salutary reasons, permit foreign corporations to do business in the State on prescribed conditions. If, despite such conditions, they can by the insertion of clauses in their policies withdraw themselves from the limitations of the Missouri statutes while obtaining all the advantages of its license, then a foreign corporation can by special contract upset the statutes of the State and become exempt from the requirements of law. Such a proposition is not to be countenanced. If the defendant corporation chose to embark in business within this State under the terms and conditions named in the statute, it could not by paper contrivances, however specious, withdraw itself from the operation of the laws by force of which it could alone do business within the State. To hold otherwise would be subversive of the right of the State to decide on what terms by comity a foreign corporation should be permitted to do business or be recognized therefor within the State jurisdiction. Each State can decide for itself whether a foreign corporation shall be recognized and on what terms. Primarily, a corporation has no existence beyond the territorial limits of the State creating it, and when it does undertake business beyond it does so only by comity. The defendant corpotion, having been permitted to do business in Missouri under the statutes of the latter, was bound by all the provisions of those statutes, and could not, by the insertion of any of the many clauses in its forms of application, etc., withdraw itself from the obli-

60 gatory force of the statute. The contract of insurance is, therefore, a Missouri contract and subject to the local law."

In the case of Wall *vs.* Equitable Life Assur. Soc., 32 Fed. Reporter, 273, it was said:

"The defendant is a New York corporation doing business in the State of Missouri. The insured was a citizen and resident of Missouri and made his application here, which was forwarded to New York; the application was accepted, the policy fully prepared and signed in that State and sent to Missouri and delivered to the applicant here. By the terms of the policy all premiums are payable at the defendant's office in New York. If the sum insured should become payable, the payment is to be made at its office in New York. * * * Under these facts I have little doubt as to the true answer to be made to this first question, viz: 'Is the contract sued on governed and to be construed by the laws of the State

of New York or by the laws of the State of Missouri? In White *vs.* Insurance Company, 4 Dill., 177, it was held that the act of the legislature of the State of Missouri, March 23rd, 1874, in respect to policies of life insurance extends to all policies of life insurance delivered in this State after the act went into effect.' That was a suit against a foreign insurance company doing business in the State. In Fletcher *vs.* Ins. Co., 13 Fed. Rep., 526, it was held that a foreign insurance company cannot withdraw itself from the operation of the statute of a State in which it does business by insertion of clauses in its policies." That was a case in which the defendant company insisted that, by virtue of certain clauses in the application, the contract was to be finally and fully executed in New York. In his opinion, an opinion concurred in by Circuit Judge McCrary, Judge Treat uses this language:

"The defendant corporation, having been permitted to do business in Missouri under the statutes of the latter, was bound by all the provisions of those statutes, and could not, by the insertion of any of the many clauses of its forms of application, withdraw
61 itself from the obligatory force of the statute. The contract of insurance is, therefore, a Missouri contract and subject to the local law."

"In view of these authorities and considering the reasoning of Judge Treat in the opinion above referred to, I deem it unnecessary to discuss the question further and simply hold that the Missouri statute controls." Affirmed in Supreme Court U. S.

The same rule is announced in Equitable Life Soc. *vs.* Winning, 58 Fed. Rep., 541; Berry *vs.* Knights Templars and Masons' Life Indemnity Company, 46 Fed. Rep., 439, and in Price *vs.* The Connecticut Mutual Life Ins. Co., 48 Mo. App., 281.

It is true that there was no express provision in the contract which formed the basis of the Clements suit, *supra*, as there is in the case at bar, with respect to the State by whose laws the contract should be construed or as to the place of contract; but defendant was at the time of the execution of the contract doing business in this State *ex gratia* and could not with respect to such business evade the statute of this State or withdraw itself from its operation by the insertion of clauses in the policy. Fletcher *vs.* Ins. Co., *supra;* Wall *vs.* Equitable Life Assurance Co., *supra.*

In Price *vs.* Insurance Co., *supra*, it is said: "Where an insurance company does business in this State and issues its policies to residents of this State the validity of clauses in its policies must be determined by the laws of this State. The laws of this State establish a rule of public policy which overrides the freedom of contract of the parties and makes waiver of statutory provisions eneffectual, although such waivers are contained in the strongest terms in the policies."

Foreign insurance companies which do business in this State do so not by right, but by grace, and must in so doing conform to its laws; they cannot avail themselves of its benefits without
62 bearing its burdens; moreover, the State may prescribe conditions upon which it will permit a foreign insurance com-

pany to transact business within its borders or exclude them altogether, and in so doing violates no contractural rights of the company. State *vs.* Stone, 118 Mo., 388; Daggs *vs.* Ins. Co., 136 Mo., 382; same case, — U. S., —.

It is therefore concluded that the contract is a Missouri contract and governed by the laws of this State.

Being a Missouri contract, the statute then in force with respect to the subject-matter of the contract entered into and become part thereof as much as if copied therein. State, to use of Wolf, *vs.* Berning, 74 Mo., 84; Reed *vs.* Painter, 129 Mo. L. C., 680; Havens *vs.* Germania Fire Ins. Co., 123 Mo., 403; White *vs.* Ins. Co., 4 Dillon, 177.

The question, then, is, Could the parties themselves enter into a contract, either directly or indirectly, waiving the provisions of the statute?

It was held in Equitable Life Assurance Society *vs.* Clements, *supra*, that sections 5983, 5986, *supra*, established a rule of commutation upon default in payment of premiums after two premiums have been paid on a policy of life insurance, which could not be raised or waived by express provision in the contract except in the cases specified in those statutes. The court said:

"The manifest object of the statute, as of many statutes regulating the form of policies of insurance on lives or against fires is to prevent insurance companies from inserting — their policies conditions of forfeiture or restriction, except so far as the statute permits. The statute is not directory only or subject to be set aside by the company with the consent of the assured, but it is mandatory and controls the nature and terms of the contract into which the company may induce the assured to enter. This clearly appears from the unequivocal words of command and of prohibition above quoted, by which, in section 5983, 'no policy of insurance' issued by any life insurance company authorized to do business in
63 this State 'shall, after the payment of two full annual premiums, be forfeited or become void by reason of the nonpayment of premium thereon, but it shall be subject to the following rules of commutation,' and in section 5985, that if the assured dies within the term of temporary insurance, as determined in the former section, 'the company shall be bound to pay the amount of the policy,' 'anything in the policy to the contrary notwithstanding.' This construction is put beyond doubt by section 5986, which, by specifying four cases (two of which relate to the form of the policy) in which the three preceding sections shall not be applicable, necessarily implies that those sections shall control all cases not so specified, whatever be the form of the policy."

"It follows that the insertion in the policy of a provision for a different rule of commutation from that prescribed by the statute in case of default of payment of premium after three premiums have been paid, as well as the insertion in the application of a clause by which the beneficiary purports to 'waive and relinquish all right or claim to any other surrender value than that so provided, whether required by the statute of any State or not,' is

an effectual attempt to evade and nullify the clear words of the statutes."

The recent case of The Equitable Life Assur. Soc. *vs.* Nixon, 81 Fed. Rep., 796, was a suit upon a policy issued by the company, a corporation of the State of New York and doing business in the then Territory of Washington. The assured paid all premiums that accrued prior to July 14, 1890, according to the terms of the policy, but made default in the payment of the premium which fell due on that day, in consequence of which the corporation insisted that the policy was rendered void. The court observed: "That depends upon whether the contract is to be regarded as a Washington or New York contract, for there is no statute of Washington affecting that provision of the policy which declares that 'if any premium or installment of a premium on this policy
64 shall not be paid when due, this policy shall be void.'

"In the State of New York there is such a statute, and hence the principal question in the case is whether the policy in suit was a New York contract, and to be ruled in accordance with the statute of that State, or to be governed by the principles of the common law which are in force in Washington in respect to such contracts of insurance. We think it clear that the policy in question was a New York contract. * * * It would seem to be very clear, therefore, that the rights and obligations of the respective parties are to be measured and controlled by the laws of that State, subject, perhaps, to any additional limitations or conditions imposed by the statute of the State (then Territory) into which the defendant corporation went to solicit the business in question, for it may be true that every foreign corporation that enters a State other than that of its creation, and there transacts business, does so in subordination to the statutes of the State permitting its entry therein, and that no business transacted by virtue of the privilege thus conferred can, by any sort of contracts, be removed from the operation of the statute of the State permitting the business to be transacted.

But in the present case, as has been said, there is no Washington statute affecting that portion of the policy here in question."

It is manifest from this decision that if the statutes of Washington had prohibited the forfeiture of the policy upon the ground of the non-payment of premium when due, as do the statutes of this State, that the conclusion reached would have been different.

The rule to be deduced from the authorities seem to be that when no statute intervenes prohibiting it, a corporation doing business by permission in another State from that of its incorporation may by contract make the law of the State of its incorporation the applicatory law of the contract, but that where the laws of the State in which it does business by license prohibits such corpora-
65 tions from making certain kinds of contracts, they can only act in accordance therewith.

As the non-forfeiture clause in section 5983 does not come within the exceptions specified in section 5986, it would seem that the provision in the policy with respect to its forfeiture or lapse

after being in force three full years, by the non payment of premiums, is void and of no effect, and that such statutory provision cannot be waived.

While defendant does not concede that the policy in suit can upon any theory be held subject to the statutes of this State, it is insisted that the facts of this case bring the policy within the exception provided by section 5986, as the unconditional commutation paid-up insurance provided therein was equal at the time of default to the — provided by section 5984 of the statute, and the provision for extended insurance by the express terms of the statute was, therefore, not applicable.

By the provisions of sections 5986, *supra*, the three preceding sections are made inapplicable in case the policy shall contain a provision for an unconditional cash surrender value at least equal to the net single premium for the temporary insurance therefor provided therein, or for the unconditional commutation of the policy to non-forfeitable paid-up insurance, for which the net value shall be equal to that provided for in section 5984.

The policy was a fifteen-year payment life. It provided that in the event of default after being in force three full years "a paid-up policy will be issued on demand made within six months after such lapse, with surrender of this policy under the same conditions as this policy except as to payment of premiums, but without participation in profits, for an amount equal to as many fifteenth parts of the sum above insured as there shall have been complete annual payments paid thereon, which said default in the payment of premiums shall be made."

The provision with respect to paid-up policy provided by section 5984 of the statute is as follows: "That on demand made
66 within sixty days of default, the company shall issue its paid-up policy, which * * * in case of a limited-payment life policy or of a continued-payment endowment policy, payable at a certain time or at death, shall be for an amount bearing such a proportion to the amount of the original policy as the number of complete annual premiums actually paid shall bear — the number of such annual payment- stipulated to be paid (also providing for the deduction of indebtedness and the surrender of the original policy)."

It is argued that this comparison of the statute with the policy must obviously be made at the date of default, when the right of the insured to the benefit of his reserve matures; and as at this date, May, 1891, Mr. Cravens had paid four premiums, he was entitled to a commission to paid-up insurance of the precise amount fixed by section 5984; that the method of computation is identical, and therefore the value of the paid-up policy to which the insured was entitled at the time of the default on making demand thereof was precisely what he was entitled to under the statute; that it is immaterial under the policy that he had six months in which to make his demand, and under the statute only sixty days, or that he failed to make demand of the company for a paid-up policy, and that the company waived this failure, as the comparison must be made at

the date of default, as his rights under the policy become fixed at that time.

We are, however, inclined to a different view, and that this policy does not come within the provision of and is not governed or affected by section 5984.

This section, we think, has reference solely to paid-up policies, and gives the holder of a policy who is entitled to extended insurance, under section 5983, the right to compell the company, within a limited time from the beginning of such extended insurance, to convert the extended insurance into a paid-up policy of a prescribed value, if he so desire, but that this right ceases at the expiration of sixty days from the date that the unpaid premium becomes due, and if no demand be made within that time the right to
67 paid-up insurance no longer exists. No demand for paid-up insurance was made in this case, and this section cannot be considered as controlling the rights of the parties to this action. Section 5986 exempts from the control of sections 5983, 5984, and 5985 policies of insurance which contain a provision for an unconditional cash surrender of a fixed minimum amount and policies which contain a provision for unconditional commutation to non-forfeitable paid-up insurance of a fixed minimum amount, and also exempts from the control of said sections cases wherein the holder of the policy shall, within sixty days after default is made in the payment of the premium, surrender the policy and accept from the company another form of policy, or such consideration as the holder of the policy may be entitled to under it.

This policy contains no provision for a cash surrender value, nor has anything been done by its holder to bring it within either of the two exempted cases.

The question then arises, does the policy provide for its own unconditional commutation to non-forfeitable paid-up insurance? The policy contains this provision:

"That if the premiums are not paid as heretofore provided, on or before the days when due, then this policy shall become void and all payments previously made shall be forfeited to the company, except that * * * if this policy, after being in force three full years, shall lapse or become forfeited for the non-payment of any premium, a paid-up policy will be issued on demand, made within six months after such lapse, with surrender of this policy," &c.

There can be no question but that it was a condition precedent to the right of the holder of the policy in question after it lapsed for the non-payment of premiums to a paid-up policy that demand be made therefor, with surrender of the policy within six months after the policy lapsed, and no such demand could be waived by defendant so as to effect plaintiff's rights.

Hauthorne *vs.* Brooklyn Life Ins. Co., 5 Mo. App., 73, was a suit in equity to enforce specific performance of a contract of life
68 insurance. The policy contained the following clause:

"After two annual payments should the party wish to continue (notice to the company being given before the next premium becomes due) the company will issue a paid-up policy for as many

tenths of the amount originally as there have been annual premiums paid in cash." The assured paid more than two annual premiums. On December 28, 1871, another premium became due, which he failed to pay. In January, 1872, he notified the company that he wanted to discontinue his policy, and demanded a paid-up policy, which the company refused to issue, upon the ground that the assured had failed to comply with the conditions in the provisions of the policy quoted. It was held that by an express term of the policy the defendant had a right to notice before the then next premium became due of the assured's wish to discontinue, and to demand a paid-up policy, which was a condition precedent to his right thereto, and in the absence of such notice he was not entitled to recover.

Knapp *vs.* Homeopathetic Life Ins. Co., 117 U. S., 411, was a suit upon a policy of life insurance which provided "that unless this policy shall be surrendered and such paid-up policy shall be applied for within ninety days after such non-payment as aforesaid then this policy shall be void and of no effect, and it was held that the surrender of the policy and the application for a paid-up policy within ninety days after non-payment of the premium were conditions precedent to plaintiff's right to recover."

The same rule is announced with respect to policies containing similar provisions in the following cases: Sheerer *vs.* Manhattan Life Ins. Co., 16 Fed. Rep., 720; Northwestern Mutual Life Ins. Co. *vs.* Barbour *et al.*, 17 S. W. Rep., 796; Hudson *vs.* Knickerbocker Life Ins. Co., 28 N. J. Equity, 167; Coppey *vs.* Universal Life Ins. Co., 10 Bissell, 354.

69 Price *vs.* The Connecticut Life Ins. Co., *supra*, was a suit upon a life-insurance policy containing this provision, viz: "If after the payment of two or more annual premiums as above, any subsequent premium or installment of premium be not paid when due, said company do thereupon and thereafter, and upon the same consideration hereinbefore set forth, but without further payment of premiums, insure said life for said term, but only in a sum to be ascertained by the table of paid-up insurance indorsed herein and hereby made a part of this contract, such sum to be payable at the time and place and in the manner and to the persons above named."

In that case the assured died after having made two full annual premiums on said policy. The last installment was paid March 4, 1888. The administrator of the assured claimed that the policy at the date of the payment of the last installment of premiums had acquired a net value of eighty dollars, to be computed according to the terms of the policy, and that three-fourths of such net value taken and applied as a net single premium for temporary insurance for the full amount written in the policy entitled the insured to temporary insurance for $2,000 for a term expiring March 4, 1889, and brought suit for that sum.

The defendant company resisted the recovery on the ground that the value of the policy and the amount which the representatives of the assured were entitled to recover thereunder must be deter-

mined by the terms of the contract between the assured and the company, and not by the provisions of the statute of the State of Missouri, the provisions of which were expressly waived by the parties and were inapplicable under the exceptions made by section 5986.

70 As there had been paid more than two full annual premiums *paid* on the policy, plaintiff claimed temporary insurance under section 5983, but the court held that the clause in the policy quoted provided for the unconditional commutation of the policy to non-forfeitable paid-up insurance; that the policy come within the second exception of section 5986, and that plaintiff was entitled to paid-up insurance, according to the terms of the policy, and not to temporary insurance under the provisions of section 5983.

It does not appear that the policy in suit in that case required that a demand for a paid-up policy be made on the company at any time before it would agree to issue such a policy, in which event plaintiff's policy would have been a conditional one, and would have entitled the holder to temporary insurance for the face of the policy under section 5983, but in the case at bar the policy required that demand be made for a paid-up policy within six months after default in the payment of premium, before the holder was entitled to a paid-up policy. Whether the holder would exercise that right or not was discretionary with him and not for defendant to decide for him. It follows that the policy in suit is not governed by section 5986.

It is, however, controlled by sections 5983 and 5985.

By section 5983 three-fourths of the net reserve is applied on the policy as a single premium, which continues the full amount of the policy in force and then prescribes a rule for fixing the term for which such temporary insurance shall be in force.

By section 5985 it is provided that if the death of the assured occur within the term of temporary insurance covered by the policy the company shall be bound to pay the amount of the policy, less the unpaid premiums, with compound interest thereon at six per cent.

71 The policy was a fifteen-year endowment, issued May 11, 1887, for $10,000; age of the assured at that time was 49 years. Four annual premiums of $589.50 were paid on it, default being made in the payment of the premium which fell due May 11, 1891. Its net value, based upon American experience table of mortality, with interest at 4½ per cent. at the date of default in payment of premium, was $1,957.21. Under section 5983 of the statutes three-fourths of the net value, or $1,467.91, is applied as a single premium for temporary insurance at the attained age of the insured at the time of default in payment of premium.

The insured at time of default in premium in this case being 53 years old and the amount to be applied as a single premium for temporary insurance $1,467.91, the insurance is in force for a period of nine years and seventy-one days from date of lapse, May 11, 1891, and upon this basis plaintiff is entitled to recover.

It is well settled that the legislature of the State has the power to pass laws regulating and prescribing rules by which foreign insurance companies may do business in this State and to prohibit them from doing so altogether if so inclined. Paul *vs.* Virginia, 8 Wall., 168; State *vs.* Stone, *supra;* Hooper *vs.* California, 155 U. S., 648; Daggs *vs.* Insurance Co., *supra.* This case has recently been affirmed by the Supreme Court of the United States.

It logically follows that in passing the sections of the statute quoted the legislature did not exceed the powers conferred upon it by the State constitution, and that such legislation is not in conflict with any provision of the Constitution of the United States.

For these considerations we reverse the judgment and remand the cause, with directions to the court below to enter up judgment for plaintiff in accordance with the views herein expressed.

Gantt, C. J.; Sherwood, Brace, Robinson, JJ., concur; Marshall, J., absent; Valliant, J., not sitting.

G. D. BURGESS, *J.*

72 And afterwards, to wit, on the 2nd day of March, 1899, the further following proceedings were had in said cause, viz:

FANNIE CRAVENS, App.,
vs.
N. Y. LIFE INS. CO., Resp.

Comes now the said respondent, by attorney, and files its motion for a rehearing herein.

Which said motion for rehearing is in words and figures as follows, to wit:

In the Supreme Court of Missouri, in Banc, October Term, 1898.

FANNIE CRAVENS, Appellant,
vs.
NEW YORK LIFE INSURANCE COMPANY, Respondent. } No. 7606.

Respondent's Motion for Rehearing.

Now comes respondent and moves the court to set aside the judgment of reversal entered in this cause on the 21st day of February, 1899, and to grant a rehearing, and for reasons therefor respondent says:

First. That the court in its construction of the term "unconditional commutation," in section 5986, R. S. 1889, of the statute relied upon by appellant overlooked the distinction between conditions dependent upon the will of the insured and conditions not so dependent, which distinction was decisive of the case and was duly submitted by counsel.

Second. The court in holding that the contract of insurance evidenced by the policy in this case was a Missouri contract because of the delivery and payment of premium in Missouri therein

overlooked the question decisive of the case and duly submitted by counsel, to wit, the principle of universal law that every contract is governed by the law with a view to which it is made, and
73 where the intent of the parties is expressed, as in the case at bar, that intention must be given force.

Third. The court in its opinion fails to distinguish between an attempted waiver of a statutory regulation based upon public policy and the agreement in good faith by the parties to an interstate contract for the applicatory law of one of such States in furtherance of the purposes of a contract; which distinction is decisive of the case and was duly presented by counsel.

Fourth. The court overlooked what was duly submitted by counsel, that the contract in this case, being a contract not only of mutual but of tontine insurance, was one wherein the other members of the tontine class had acquired contingent interests therein in consideration of the contingent interest enjoyed by the appellant in the policy contracts of her associates in the same class. The decision of the court ignores these contractual relations, defeats the purpose of the contract, and this question, decisive of the case and duly submitted by counsel, was overlooked by the court.

Fifth. The statute, as construed by the court, is violative of the Constitution of the United States and of the fourteenth amendment thereof, in that it destroys the contractual liberty of the parties and makes a new contract for them violative of their expressed intent; which question is decisive of the case and was duly submitted by counsel to the court.

Sixth. The court overlooked the essential character of the contract in this case, which was decisive thereof and was duly submitted by counsel, in that it was a contract of mutual life insurance wherein all the policy-holders of the company were associated, and the statute, as construed by the court, is violative of that right of contractual association in mutual life insurance which is guaranteed by the Constitution of the United States.

Seventh. The court overlooked the essential distinction decisive of the case and duly submitted by counsel, to wit, the dis-
74 tinction between a policy contract of mutual life insurance, such as in the case at bar, and that of fire insurance, as presented in Paul *vs.* Virginia, 8 Wallace, 168, and in Daggs *vs.* Insurance Co., 136 Mo., 382.

Eighth. The court overlooked the distinction decisive of the case and duly submitted by counsel between the regulation of foreign insurance companies and the right of contract guaranteed to such corporations and all other persons, individuals and corporate, by the Constitution of the United States and the fourteenth amendment thereof.

And afterwards, to wit, on the 10th day of March, the said appellant filed the following motion to modify the opinion herein:

FANNIE CRAVENS, Appellant,
vs.
NEW YORK LIFE INSURANCE COMPANY, Respondent. } No. 7606.

The court's attention is respectfully called to page 25 of the opinion, where the policy in suit is called an endowment. Under agreed statement and admission of counsel, the policy is not an endowment, but a fifteen-year limited payment, life. *Vide* policy, Appellant's Brief, p. 21.

The court is respectfully requested to modify its order of reversal in such manner as will cause judgment to be entered for appellant in the sum of $8,749.21, together with 6 per cent. interest thereon from Nov. 30, 1892, the date demand was made for $8,749.21 and payment was by respondent refused. *Vide* agreed statement, § 16, and Appellant's Brief, pp. 6, top, and p. 79. Appellant is admittedly entitled to recover *his* interest on becoming entitled to recover the extended insurance of $8,749.21.

Extended insurance	$8,749.21
Interest, 6 per cent., from Nov. 30, '92, to M'ch 12, '99..	3,298.10
	$12,047.31

Respectfully submitted.

75 WILLIAM B. C. BROWN,
JAMES H. CRAVENS,
KARNES, HOLMES & KRAUTHOFF,
Attorneys for Appellant.

And afterwards, to wit, on the 14th day of March, 1899, the further following proceedings were had in said cause, viz:

FRANNIE CRAVENS, App.,
vs.
N. Y. LIFE INS. CO., Resp.

Now, at this day, the court, having fully considered and understood the motions heretofore filed for rehearing herein, doth order that said motions be, and the same are hereby, denied.

And afterwards, to wit, on the 21st day of March, 1899, the further following proceedings were had in said cause, viz:

FANNIE CRAVENS, App.,
vs.
N. Y. LIFE INS. CO., Resp.

Now, at this day, the court, having fully considered and understood the motion heretofore filed to modify the opinion herein, doth order that said motion be sustained, and the opinion is modified accordingly.

Which said opinion so modified, as aforesaid, is in the words and figures following, to wit:

76 In the Supreme Court of Missouri, in Banc, October Term, 1898.

FANNY CRAVENS, Appellant,
vs.
THE NEW YORK LIFE INSURANCE COMPANY, Respondent.

In banc.

This is a suit upon a policy of life insurance for ten thousand dollars issued by the defendant company upon the life of J. K. Cravens, deceased, in favor of the plaintiff, who was his wife. The case was tried by the court, a jury being waived. There was judgment in favor of plaintiff in the sum of $2,670, from which, after an unsuccessful motion for a new trial, she appeals, claiming that she is entitled to recover the sum of $8,749.21—that is, the face of the policy, $10,000, less the two unpaid premiums which were due at the time of the death of the assured, together with interest thereon.

The petition alleges that the policy was issued on the 11th day of May, 1887; the payment of all annual premiums until May, 1891; the death of the assured on November 2, 1892; that under the statute the insurance was extended and was in force at the date of the death of the assured, and asks judgment for the amount of the policy, less the unpaid premiums.

The answer of defendant alleges that it is a mutual insurance company duly incorporated under the laws of the State of New York and doing business in this State; that by agreement of the parties the law of that State was made the law governing the contract; set up that the assured made default in May, 1891, after paying four annual premiums, and tendered the sum of $2,670.00, the amount of paid-up or commuted policy, to which the original policy was entitled by its terms on such default, waiving failure to make demand therefor. It also alleges that other policy-holders—that is, other members of the same tontine class—had, by the terms of their respective policies, acquired, with plaintiff, contingent and mutual interests in the profits and surplus to be derived from the premiums on all policies of such class, and that the company, on the faith
77 of plaintiff's contract, had incurred obligations to the other members of the tontine class, and that plaintiff is now estopped from setting up any other or different claim under the policy.

The answer further alleges that if the statute of Missouri relied on by plaintiff was construed so as to nullify the non-forfeiting agreement upon the faith of which the policy was issued and without which it would not have been issued, and to create and enforce an obligation contrary to the expressed intent of the parties, that then the statute so construed is repugnant to the constitution of Missouri and to the Constitution of the United States.

The application for the policy is made part of the contract and contains the following provisions:

"2. That inasmuch as only the officers of the office of the said company in the city of New York have authority to determine whether or not a policy shall issue on any application, and as they

act on the written statements and representations referred to, no statements, representations, promises, or information made or given by or to the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on said company, or in any manner affect its right, unless such statements, representations, or information, be reduced to writing and presented to the officers of the company, at the home office in the application." * * *

4. That under no circumstances shall the policy hereby applied for be in force until the actual payment to and acceptance of the premium by the company or its authorized agent during the lifetime and good health of the person on whose life insurance is applied for.

6. That the entire contract contained in the said policy and in this application, taken together, shall be construed and interpreted as a whole and in each of its parts and obligations, according to the laws of the State of New York, the place of the contract being expressly agreed to be the principal office of the said com-
78 pany in the city of New York.

The policy contains this further provision:

That if the premiums are not paid, as hereinafter provided, on or before the days when due, then this policy shall become void, and all payments previously made shall be forfeited to the company, except that if this policy, after being in force three full years, shall lapse or become forfeited for the non-payment of any premium, a paid-up policy will be issued, on demand made within six months after such lapse with the surrender of this policy, under the same conditions as this policy except as to payments of premiums, but without participation in profits, for an amount equal to as many fifteenth parts of the sum above insured as there shall have been complete annual premiums paid hereon when said default in the payment of premiums shall be made; and all right, claim or interest arising under statute, or otherwise, to or in any other paid-up policy or surrender value, and to or in any temporary insurance, whether required or provided for by the statute of any State, or not, is hereby expressly waived and relinquished.

The cause was tried upon an agreed statement of facts, the material parts of which are as follows:

1. That the defendant is a corporation organized and existing under the laws of the State of New York as a mutual life insurance company, without capital stock, having its chief office in the city of New York, and was at the date of issuing the policy in question and since has been and now is engaged in the business of insuring lives through branch offices situated in the different States and Territories of this country and certain foreign countries.

2. That the defendant for many years past has maintained branch offices in the State of Missouri, and has employed agents to solicit applications for insurance from citizens of Missouri, and in the year 1887, as both prior and subsequent thereto, defendant had received from the superintendent of insurance a certificate of authority to transact business in said State.

79 3. That during the year 1886 and prior to the issuance of the policy sued upon the amount of policies issued by defendant to citizens of Missouri was $1,617,985.00, and the amount of insurance in force on the lives of citizens of Missouri on December 31, 1886, was $8,886,542.00, and the total amount of policies issued by defendant in said year 1886 was $85,178,294.00, and the total amount of policies in force on December 31, 1886, issued by defendant was $304,373,540.00.

4. That on the second day of May, 1887, and long prior thereto John K. Cravens was a citizens of the State of Missouri and resident of the county of Jackson, in said State; that on the said date and long prior thereto said John K. Cravens was the husband of Fannie Cravens, the plaintiff herein, and thereafter continued to be the husband of said plaintiff, Fannie Cravens, until the time of his death.

5. That the defendant in the transaction of its business had adopted different forms of policies, embodying different and varying plans of insurance, all of them being on the mutual plan, the premiums paid, less the expense of management, being administered solely for the benefit of the policy-holders, defendant having no capital stock.

6. That on the second day of May, 1887, the local agents of defendant solicited said John K. Cravens, at his residence, in the county of Jackson and State of Missouri, to insure his life in the defendant company, and submitted to him the different plans of insurance then in use by said defendant, and said John K. Cravens selected the plan known as the non-forfeiting, limited tontine policy, fifteen-year endowment, with limited premium return, tontine, signed a written application therefor, and also signed the same in the name of the plaintiff, Fannie Cravens, as beneficiary of the policy to be issued thereunder; which said application is herewith filed * * * and made a part hereof as fully as if set forth herein. Said written application was thereupon delivered to defendant's agent at Kansas City, and was by him forwarded
80 with the report of the medical examination of said Cravens; which said medical examination of said Cravens was made by the examiner of defendant company at Kansas City, in the State of Missouri, and by said agent forwarded to defendant's home office, in the city of New York.

7. That thereafter, on the 10th day of May, 1887, said application and medical examination was received at the home office of the defendant, in the city of New York, State of New York, and was there examined by the officers of defendant, and on the 11th day of May said application and medical examination was accepted and approved, and the policy in suit, No. 250,213, was thereupon executed by the officers of said defendant at said home office; which said policy is herewith filed * * * and made a part hereof as fully as if set forth herein.

8. That said policy was transmitted by defendant to its agents at Kansas City, in Jackson county, and on the 20th day of May, 1887, the policy was delivered to said Cravens, in the county of

Jackson, in the State of Missouri, by said agent, and the first premium of $589.50 was paid by said Cravens, in the State of Missouri, to the said agent of defendant and by said agent transmitted to defendant's home office.

9. That said Cravens thereafter paid to defendant the premiums due upon said policy upon the 11th day of May, 1888, and on the 11th day of May, 1889, and on the 11th day of May, 1890, the amount of each of said premiums being received by the agent of the defendant from said Cravens at defendant's branch office in Kansas City and transmitted to defendant's home office, said agent delivering therefor to said Cravens receipts of defendant, signed by the chief officers of the company and countersigned by said agent.

10. That default was made in the payment of the premium due on the 11th day of May, 1891, and said premium has not been paid, and no subsequent premium has been paid.

81 11. That said John K. Cravens died in Kansas City, in the State of Missouri, on the second day of November, 1892, and thereafter, on the 30th day of November, 1892, proofs of death in due form, as called for by the policy of insurance, were by Fannie Cravens made out and delivered to defendant and received by defendant. A copy of said proofs of death is herewith filed * * * and made a part hereof as fully as if set forth herein.

12. That the amount of paid-up insurance to which the policy in suit, No. 250,213, was entitled according to the terms of the application and policy was $2,670; that no demand for such paid-up policy was made by or on behalf of said Cravens within six months after default, on May 11, 1891, or at any time; that defendant, upon the death of said Cravens, offered to waive the failure to make such demand, and tendered plaintiff and still tenders the amount of said policy, to wit, $2,670, which she declined and still declines to receive.

13. At the date of the issuance of said policy the only statute of the State of New York regulating or in any way relating to the forfeiture of life insurance is that set forth in chapter 341 of the Laws of 1876 of the State of New York as amended by chapter 321 of the Laws of 1877 of the said State; which said statutes may be referred to as if set forth in full herein.

14. The total number of policies issued during the year 1887 by defendant on the "non-forfeiting, limited tontine policy plan, with fifteen years' tontine period," constituting the same tontine class with policy No. 250,213, issued to the residents of all the States and countries wherein defendant did business, was five thousand one hundred and seventy-two (5,172), covering aggregate insurance in the sum of $20,154,981.00.

15. That said John K. Cravens on the 11th day of May, 1891, was fifty-three years of age, and the term of temporary insurance procured at that date by three-fourths of the net value of the policy taken as a single premium for the amount written in the policy was six years and forty-six days from the 11th day of May,

82 1891, making said policy, if subject to said extended insurance, in force at the date of the death of the said Cravens.

16. The amount which plaintiff claims under said policy is the face of the policy, to wit, $10,000, less the amount of unpaid premiums, with interest thereon, leaving a balance claimed of $8,749.21, with interest thereon, at the rate of six per cent. per annum, from the 30th day of November, 1892, and the defendant admits and offers to pay the aforementioned sum of $2,670, which the plaintiff declines to receive.

The several sections of the Revised Statutes of 1879 in force at the date of the policy sued on and having any bearing upon the issues involved are as follows:

"SECTION 5983. Policies non-forfeitable, when.—No policy of insurance on life hereafter issued by any life insurance company authorized to do business in this State, on and after the first day of August, A. D. 1879, shall, after payment upon it of two full annual premiums, be forfeited or become void by reason of the non-payment of premiums, thereon, but it shall be subject to the following rules of commutation, to wit: The net value of the policy when the premium become- due and is not paid shall be computed upon the American experience table of mortality, with four and one-half per cent. interest per annum, and after deducting from three-fourths of such net value any notes or other indebtedness to the company, given on account of past premium payments on said policy issued to the insured, which indebtedness shall then be cancelled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy; and the term for which such temporary insurance shall be in force shall be determined by the age of the person, whose life is insured at the time of default of premium, and the assumption of mortality and interest aforesaid, but if the policy shall be an endowment, payable at a certain time, or at death if it should occur previously then if what remains as aforesaid shall exceed the net single premium of temporary insurance for the remainder of the endowment
83 term for the full amount of the policy, such excess shall be considered as a net single premium, for a pure endowment of so much as such premium will purchase determined by the age of the insured at date of defaulting the payment of premium on the original policy, and the table of mortality and interest as aforesaid, which amount shall be paid at the end of the original term of endowment, if the insured shall then be alive.

"SEC. 5984. A paid-up policy may be demanded, when at any time after the payment of two or more full annual premiums and not later than sixty days from the beginning of the extended insurance provided in the preceding section the legal holder of the policy may demand of the company, and the company shall issue its paid-up policy, which in case of an ordinary life policy, shall be for such an amount as the net value of the original policy at the age and date of lapse, computed according to the American experience table of mortality, with interest at the rate of four and a half per cent. per annum, without deduction of indebtedness on account of said policy, will purchase, applied as a single premium upon the table rates of the company, and in case of a limited-payment life

policy, or of a continued-payment endowment policy payable at a certain time, or death, it shall be for an amount bearing such proportion to the amount of the original policy as the number of complete annual premiums actually paid shall bear to the number of such premiums stipulated to be paid: Provided, that from such an amount the company shall have the right to deduct the net reversionary value of all indebtedness to the company on account of such policy; and, provided, further that the policy-holder shall, at the time of making demand for such paid-up policy, surrender the original policy, legally discharged, at the parent office of the company.

"SEC. 5985. Rule of payment on commuted policy.—If the death of the insured occur within the term of temporary insurance covered by the value of the policy as determined in section 5983, and if no condition of the insurance other than the payment
84 of premiums shall have been violated by the insured, the company shall be bound to pay the amount of the policy, the same as if there had been no default in payment of premiums, anything in the policy to the contrary notwithstanding: Provided, however, that notice of the claim and proof of the death shall be submitted to the company in the same manner as provided by the terms of the policy, within ninety days after the decease of the insured; and, provided, also, that the company shall have the right to deduct from the amount insured in the policy the amount compounded at six per cent. interest per annum of all the premiums that had been forborne at the time of the decease, including the whole of the year's premium in which the death occurs, but such premiums shall in no case exceed the ordinary life premium for the age at issue, with interest as last aforesaid.

"SEC. 5986. The foregoing provisions not applicable, when.—The three preceding sections shall not be applicable in the following cases, to wit: If the policy shall contain a provision for an unconditional cash surrender value at least equal to the net single premium for the temporary insurance provided hereinbefore, or for the unconditional commutation of the policy to non-forfeitable paid-up insurance for which the net value shall be equal to that provided for in section 5984, or if the legal holder of the policy shall, within sixty days after default of premium, surrender the policy and accept from the company another form of policy, or if the policy shall be surrendered to the company for a consideration adequate in the judgment of the legal holder thereof, then, in any of the foregoing cases, this act shall not be applicable."

The plaintiff contends that the contract of insurance, which form the basis of this suit, is a Missouri contract and must be governed by its laws, notwithstanding the defendant is a corporation incorporated under the laws of the State of New York, has its chief office there, and that the contract provides that the contract con-
85 tained in the policy and application shall be construed according to the laws of the State of New York, the place of said contract being agreed to be the home office of said company in the city of New York. This contention is not only predicated of

the fact that the contract also provides "that under no circumstances shall the policy hereby applied for be in force until the actual payment to and acceptance of the premiums by the company or its authorized agent during the lifetime and good health of the person on whose life insurance is applied for," but upon the further fact that the application was by defendant's agent in Kansas City, Missouri, transmitted to defendant at its home office in said city, upon receipt of which the company issued the policy containing the clause quoted, sent the same to its agent at Kansas City, who afterwards delivered the policy to the insured in Missouri, and then and there received the first premium. However perfect in form the contract may have been, and although all of its other terms and conditions may have been complied with, payment of the premium during the life and good health of the assured and delivery of the contract to him were conditions precedent in order to complete its execution, and as if the premiums were paid and the policy delivered to the assured, in this State, it must follow that the contract was executed here.

Equitable Life Society *vs.* Clements, 140 U. S., 226, was a suit upon a life-insurance policy executed in New York by a corporation of that State doing business in this State upon an application signed in this State by one of its residents and made part of the contract, which provided that it should not take effect until the first premium was actually paid during the life of the person proposed for insurance and which was delivered and the first premium paid in Missouri, and it was held, in the absence of evidence of the company's acceptance of the application in New York, to be a Missouri contract and governed by the laws of Missouri.

In Hicks *vs.* National Life Ins. Co., 60 Fed. Rep., 690, it is said:

"If any authority were needed for the proposition that a
86 policy applied for in New York, delivered there and the premiums paid there, is a New York contract, notwithstanding it is signed and issued by the insurer in another State, the reference is supplied by the case of Assur. Soc. *v.* Clements, 140 U. S., 226. The delivery of the policies in the present case was made in New York city to an agent of the assured and in legal effect was as if the assured had been personally present and received them. Then, and not before, the policies took effect."

In Northwestern Mut. Life Ins. Co. *v.* Elliott *et al.*, 5 Fed. Rep., 225, an application for a policy was made at Portland, Oregon, to the company's agent, who forwarded same to the company at Milwaukee, Wisconsin. The company thereupon, in Wisconsin, issued its policy containing a clause, viz:

"This policy shall not take effect and become binding on the company until the premium shall be actually paid during the lifetime of the person whose life is assured to the company or some person authorized to receive it, who shall countersign the policy on receipt of the premium," and transmitted same to its agent at Portland, Oregon, who there delivered it to the insured.

The court said: "Where, then, was this contract made; in Wisconsin or Oregon? The answer to this question involves the in-

quiry where did the final act take place which made the transaction a contract binding on the parties?

"The premium was paid to the agent of the plaintiff at Portland, who then and there countersigned and delivered the policy. This was the consummation and completion of the contract. But, to put this beyond a doubt, the policy itself declares that it shall not be binding on the company until these acts are performed, and until it was binding on the company it was not binding on the applicant; in short, it was not yet a contract, but only a proposition." Pomeroy *vs.* Manhattan Life Ins. Co., 40 Ills., 400; Thwing *vs.* Great Western Ins. Co., 111 Mass., 109; Wood F. Ins., 189, note 2; Hardie *v.* St. Louis Mut. Life Ins. Co., 26 La. Ann., 242; St. Louis Mut. Life Ins. Co. *vs.* Kennedy, 6 Bush., 450.

87 In Fletcher *vs.* New York Life Ins. Co., 13 Fed. Rep., 526, the policy was delivered in Missouri to a citizen of Missouri and the first premium there paid. The court said:

"The defendant company was doing business in Missouri with the privileges granted to it here when said insurance was effected. It may be that the formal acceptance of the proposed contract was by the letter of the contract to be consummated in New York. The broad proposition, however, remains, no artifice to avoid which can be upheld. The statutes of Missouri, for salutary reasons, permit foreign corporations to do business in the State on prescribed conditions. If, despite such conditions, they can by the insertion of clauses in their policies withdraw themselves from the limitations of the Missouri statutes while obtaining all the advantages of its license, then a foreign corporation can by special contract upset the statutes of the State and become exempt from the requirements of law. Such a proposition is not to be countenanced. If the defendant corporation chose to embark in business within this State under the terms and conditions named in the statute, it could not by paper contrivances, however specious, withdraw itself from the operation of the laws by force of which it could alone do business within the State. To hold otherwise would be subversive of the right of the State to decide on what terms by comity a foreign corporation should be permitted to do business or be recognized therefor within the State jurisdiction. Each State can decide for itself whether a foreign corporation shall be recognized and on what terms. Primarily, a corporation has no existence beyond the territorial limits of the State creating it, and when it does undertake business beyond it does so only by comity. The defendant corpotion, having been permitted to do business in Missouri under the statutes of the latter, was bound by all the provisions of those statutes, and could not, by the insertion of any of the many clauses in its forms of application, etc., withdraw itself from the obli-

88 gatory force of the statute. The contract of insurance is, therefore, a Missouri contract and subject to the local law."

In the case of Wall *vs.* Equitable Life Assur. Soc., 32 Fed. Reporter, 273, it was said:

"The defendant is a New York corporation doing business in the State of Missouri. The insured was a citizen and resident of

Missouri and made his application here, which was forwarded to New York; the application was accepted, the policy fully prepared and signed in that State and sent to Missouri and delivered to the applicant here. By the terms of the policy all premiums are payable at the defendant's office in New York. If the sum insured should become payable, the payment is to be made at its office in New York. * * * Under these facts I have little doubt as to the true answer to be made to this first question, viz: 'Is the contract sued on governed and to be construed by the laws of the State of New York or by the laws of the State of Missouri? In White *vs.* Insurance Company, 4 Dill., 177, it was held that the act of the legislature of the State of Missouri, March 23rd, 1874, in respect to policies of life insurance extends to all policies of life insurance delivered in this State after the act went into effect.' That was a suit against a foreign insurance company doing business in the State. In Fletcher *vs.* Ins. Co., 13 Fed. Rep., 526, it was held that a foreign insurance company cannot withdraw itself from the operation of the statute of a State in which it does business by insertion of clauses in its policies." That was a case in which the defendant company insisted that, by virtue of certain clauses in the application, the contract was to be finally and fully executed in New York. In his opinion, an opinion concurred in by Circuit Judge McCrary, Judge Treat uses this language:

"The defendant corporation, having been permitted to do business in Missouri under the statutes of the latter, was bound by all the provisions of those statutes, and could not, by the insertion of any of the many clauses of its forms of application, withdraw
89 itself from the obligatory force of the statute. The contract of insurance is, therefore, a Missouri contract and subject to the local law."

"In view of these authorities and considering the reasoning of Judge Treat in the opinion above referred to, I deem it unnecessary to discuss the question further and simply hold that the Missouri statute controls." Affirmed in Supreme Court U. S.

The same rule is announced in Equitable Life Soc. *vs.* Winning, 58 Fed. Rep., 541; Berry *vs.* Knights Templars and Masons' Life Indemnity Company, 46 Fed. Rep., 439, and in Price *vs.* The Connecticut Mutual Life Ins. Co., 48 Mo. App., 281.

It is true that there was no express provision in the contract which formed the basis of the Clements suit, *supra*, as there is in the case at bar, with respect to the State by whose laws the contract should be construed or as to the place of contract; but defendant was at the time of the execution of the contract doing business in this State *ex gratia* and could not with respect to such business evade the statute of this State or withdraw itself from its operation by the insertion of clauses in the policy. Fletcher *vs.* Ins. Co., *supra;* Wall *vs.* Equitable Life Assurance Co., *supra.*

In Price *vs.* Insurance Co., *supra*, it is said: "Where an insurance company does business in this State and issues its policies to residents of this State the validity of clauses in its policies must be determined by the laws of this State. The laws of this State establish

a rule of public policy which overrides the freedom of contract of the parties and makes waiver of statutory provisions eneffectual, although such waivers are contained in the strongest terms in the policies."

Foreign insurance companies which do business in this State do so not by right, but by grace, and must in so doing conform to its laws; they cannot avail themselves of its benefits without
90 bearing its burdens; moreover, the State may prescribe conditions upon which it will permit a foreign insurance company to transact business within its borders or exclude them altogether, and in so doing violates no contractural rights of the company. State *vs.* Stone, 118 Mo., 388; Daggs *vs.* Ins. Co., 136 Mo., 382; same case, — U. S., —.

It is therefore concluded that the contract is a Missouri contract and governed by the laws of this State.

Being a Missouri contract, the statute then in force with respect to the subject-matter of the contract entered into and become part thereof as much so as if copied therein. State, to use of Wolf, *vs.* Berning, 74 Mo., 84; Reed *vs.* Painter, 129 Mo. L. C., 680; Havens *vs.* Germania Fire Ins. Co., 123 Mo., 403; White *vs.* Ins. Co., 4 Dillon, 177.

The question, then, is, Could the parties themselves enter into a contract, either directly or indirectly, waiving the provisions of the statute?

It was held in Equitable Life Assurance Society *vs.* Clements, *supra*, that sections 5983, 5986, *supra*, established a rule of commutation upon default in payment of premiums after two premiums have been paid on a policy of life insurance, which could not be raised or waived by express provision in the contract except in the cases specified in those statutes. The court said:

"The manifest object of the statute, as of many statutes regulating the form of policies of insurance on lives or against fires, is to prevent insurance companies from inserting — their policies conditions of forfeiture or restriction, except so far as the statute permits. The statute is not directory only or subject to be set aside by the company with the consent of the assured, but it is mandatory and controls the nature and terms of the contract into which the company may induce the assured to enter. This clearly appears from the unequivocal words of command and of prohibition above quoted, by which, in section 5983, 'no policy of insurance' issued by any life insurance company authorized to do business in
91 this State 'shall, after the payment of two full annual premiums, be forfeited or become void by reason of the nonpayment of premium thereon, but it shall be subject to the following rules of commutation,' and in section 5985, that if the assured dies within the term of temporary insurance, as determined in the former section, 'the company shall be bound to pay the amount of the policy,' 'anything in the policy to the contrary notwithstanding.' This construction is put beyond doubt by section 5986, which, by specifying four cases (two of which relate to the form of the policy) in which the three preceding sections shall not be applicable, neces-

sarily implies that those sections shall control all cases not so specified, whatever be the form of the policy."

"It follows that the insertion in the policy of a provision for a different rule of commutation from that prescribed by the statute in case of default of payment of premium after three premiums have been paid, as well as the insertion in the application of a clause by which the beneficiary purports to 'waive and relinquish all right or claim to any other surrender value than that so provided, whether required by the statute of any State or not,' is an effectual attempt to evade and nullify the clear words of the statutes."

The recent case of The Equitable Life Assur. Soc. *vs.* Nixon, 81 Fed. Rep., 796, was a suit upon a policy issued by the company, a corporation of the State of New York and doing business in the then Territory of Washington. The assured paid all premiums that accrued prior to July 14, 1890, according to the terms of the policy, but made default in the payment of the premium which fell due on that day, in consequence of which the corporation insisted that the policy was rendered void. The court observed: "That depends upon whether the contract is to be regarded as a Washington or New York contract, for there is no statute of Washington affecting that provision of the policy which declares that 'if any premium or installment of a premium on this policy
92 shall not be paid when due, this policy shall be void.'

"In the State of New York there is such a statute, and hence the principal question in the case is whether the policy in suit was a New York contract, and to be ruled in accordance with the statute of that State, or to be governed by the principles of the common law which are in force in Washington in respect to such contracts of insurance. We think it clear that the policy in question was a New York contract. * * * It would seem to be very clear, therefore, that the rights and obligations of the respective parties are to be measured and controlled by the laws of that State, subject, perhaps, to any additional limitations or conditions imposed by the statute of the State (then Territory) into which the defendant corporation went to solicit the business in question, for it may be true that every foreign corporation that enters a State other than that of its creation, and there transacts business, does so in subordination to the statutes of the State permitting its entry therein, and that no business transacted by virtue of the privilege thus conferred can, by any sort of contracts, be removed from the operation of the statute of the State permitting the business to be transacted.

But in the present case, as has been said, there is no Washington statute affecting that portion of the policy here in question."

It is manifest from this decision that if the statutes of Washington had prohibited the forfeiture of the policy upon the ground of the non-payment of premium when due, as do the statutes of this State, that the conclusion reached would have been different.

The rule to be deduced from the authorities seem to be that when no statute intervenes prohibiting it, a corporation doing business

by permission in another State from that of its incorporation may by contract make the law of the State of its incorporation the applicatory law of the contract, but that where the laws of the State in which it does business by license prohibits such corporations from making certain kinds of contracts, they can only act in accordance therewith.

93

As the non-forfeiture clause in section 5983 does not come within the exceptions specified in section 5986, it would seem that the provision in the policy with respect to its forfeiture or lapse after being in force three full years, by the non payment of premiums, is void and of no effect, and that such statutory provision cannot be waived.

While defendant does not concede that the policy in suit can upon any theory be held subject to the statutes of this State, it is insisted that the facts of this case bring the policy within the exception provided by section 5986, as the unconditional commutation paid-up insurance provided therein was equal at the time of default to the — provided by section 5984 of the statute, and the provision for extended insurance by the express terms of the statute was, therefore, not applicable.

By the provisions of sections 5986, *supra*, the three preceding sections are made inapplicable in case the policy shall contain a provision for an unconditional cash surrender value at least equal to the net single premium for the temporary insurance therefor provided therein, or for the unconditional commutation of the policy to non-forfeitable paid-up insurance, for which the net value shall be equal to that provided for in section 5984.

The policy was a fifteen-year payment life. It provided that in the event of default after being in force three full years "a paid-up policy will be issued on demand made within six months after such lapse, with surrender of this policy under the same conditions as this policy except as to payment of premiums, but without participation in profits, for an amount equal to as many fifteenth parts of the sum above insured as there shall have been complete annual payments paid thereon, which said default in the payment of premiums shall be made."

The provision with respect to paid-up policy provided by section 5984 of the statute is as follows: "That on demand made within sixty days of default, the company shall issue its paid-up policy, which * * * in case of a limited-payment life policy or of a continued-payment endowment policy, payable at a certain time or at death, shall be for an amount bearing such a proportion to the amount of the original policy as the number of complete annual premiums actually paid shall bear — the number of such annual payment- stipulated to be paid (also providing for the deduction of indebtedness and the surrender of the original policy)."

94

It is argued that this comparison of the statute with the policy must obviously be made at the date of default, when the right of the insured to the benefit of his reserve matures; and as at this date, May, 1891, Mr. Cravens had paid four premiums, he was

entitled to a commission to paid-up insurance of the precise amount fixed by section 5984; that the method of computation is identical, and therefore the value of the paid-up policy to which the insured was entitled at the time of the default on making demand thereof was precisely what he was entitled to under the statute; that it is immaterial under the policy that he had six months in which to make his demand, and under the statute only sixty days, or that he failed to make demand of the company for a paid-up policy, and that the company waived this failure, as the comparison must be made at the date of default, as his rights under the policy become fixed at that time.

We are, however, inclined to a different view, and that this policy does not come within the provision of and is not governed or affected by section 5984.

This section, we think, has reference solely to paid-up policies, and gives the holder of a policy who is entitled to extended insurance, under section 5983, the right to compel the company, within a limited time from the beginning of such extended insurance, to convert the extended insurance into a paid-up policy of a prescribed value, if he so desire, but that this right ceases at the expiration of sixty days from the date that the unpaid premium becomes due, and if no demand be made within that time the right to
95 paid-up insurance no longer exists. No demand for paid-up insurance was made in this case, and this section cannot be considered as controlling the rights of the parties to this action. Section 5986 exempts from the control of sections 5983, 5984, and 5985 policies of insurance which contain a provision for an unconditional cash surrender of a fixed minimum amount and policies which contain a provision for unconditional commutation to non-forfeitable paid-up insurance of a fixed minimum amount, and also exempts from the control of said sections cases wherein the holder of the policy shall, within sixty days after default is made in the payment of the premium, surrender the policy and accept from the company another form of policy, or such consideration as the holder of the policy may be entitled to under it.

This policy contains no provision for a cash surrender value, nor has anything been done by its holder to bring it within either of the two exempted cases.

The question then arises, does the policy provide for its own unconditional commutation to non-forfeitable paid-up insurance? The policy contains this provision:

"That if the premiums are not paid as heretofore provided, on or before the days when due, then this policy shall become void and all payments previously made shall be forfeited to the company, except that * * * if this policy, after being in force three full years, shall lapse or become forfeited for the non-payment of any premium, a paid-up policy will be issued on demand, made within six months after such lapse, with surrender of this policy," &c.

There can be no question but that it was a condition precedent to the right of the holder of the policy in question after it lapsed for the non-payment of premiums to a paid-up policy that demand be

made therefor, with surrender of the policy within six months after the policy lapsed, and no such demand could be waived by defendant so as to effect plaintiff's rights.

Hauthorne *vs.* Brooklyn Life Ins. Co., 5 Mo. App., 73, was a suit in equity to enforce specific performance of a contract of life
96 insurance. The policy contained the following clause: "After two annual payments should the party wish to continue (notice to the company being given before the next premium becomes due) the company will issue a paid-up policy for as many tenths of the amount originally as there have been annual premiums paid in cash." The assured paid more than two annual premiums. On December 28, 1871, another premium became due, which he failed to pay. In January, 1872, he notified the company that he wanted to discontinue his policy, and demanded a paid-up policy, which the company refused to issue, upon the ground that the assured had failed to comply with the conditions in the provisions of the policy quoted. It was held that by an express term of the policy the defendant had a right to notice before the then next premium became due of the assured's wish to discontinue, and to demand a paid-up policy, which was a condition precedent to his right thereto, and in the absence of such notice he was not entitled to recover.

Knapp *vs.* Homeopathetic Life Ins. Co., 117 U. S., 411, was a suit upon a policy of life insurance which provided "that unless this policy shall be surrendered and such paid-up policy shall be applied for within ninety days after such non-payment, as aforesaid, then this policy shall be void and of no effect, and it was held that the surrender of the policy and the application for a paid-up policy within ninety days after non-payment of the premium were conditions precedent to plaintiff's right to recover."

The same rule is announced with respect to policies containing similar provisions in the following cases: Sheerer *vs.* Manhattan Life Ins. Co., 16 Fed. Rep., 720; Northwestern Mutual Life Ins. Co. *vs.* Barbour *et al.*, 17 S. W. Rep., 796; Hudson *vs.* Knickerbocker Life Ins. Co., 28 N. J. Equity, 167; Coppey *vs.* Universal Life Ins. Co., 10 Bissell, 354.

97 Price *vs.* The Connecticut Life Ins. Co., *supra*, was a suit upon a life-insurance policy containing this provision, viz: "If after the payment of two or more annual premiums as above, any subsequent premium or installment of premium be not paid when due, said company do thereupon and thereafter, and upon the same consideration hereinbefore set forth, but without further payment of premiums, insure said life for said term, but only in a sum to be ascertained by the table of paid-up insurance indorsed herein and hereby made a part of this contract, such sum to be payable at the time and place and in the manner and to the persons above named."

In that case the assured died after having made two full annual premiums on said policy. The last installment was paid March 4, 1888. The administrator of the assured claimed that the policy at the date of the payment of the last installment of premiums had

acquired a net value of eighty dollars, to be computed according to the terms of the policy, and that three-fourths of such net value taken and applied as a net single premium for temporary insurance for the full amount written in the policy entitled the insured to temporary insurance for $2,000 for a term expiring March 4, 1889, and brought suit for that sum.

The defendant company resisted the recovery on the ground that the value of the policy and the amount which the representatives of the assured were entitled to recover thereunder must be determined by the terms of the contract between the assured and the company, and not by the provisions of the statute of the State of Missouri, the provisions of which were expressly waived by the parties and were inapplicable under the exceptions made by section 5986.

98 As there had been paid more than two full annual premiums *paid* on the policy, plaintiff claimed temporary insurance under section 5983, but the court held that the clause in the policy quoted provided for the unconditional commutation of the policy to non-forfeitable paid-up insurance; that the policy come within the second exception of section 5986, and that plaintiff was entitled to paid-up insurance, according to the terms of the policy, and not to temporary insurance under the provisions of section 5983.

It does not appear that the policy in suit in that case required that a demand for a paid-up policy be made on the company at any time before it would agree to issue such a policy, in which event plaintiff's policy would have been a conditional one, and would have entitled the holder to temporary insurance for the face of the policy under section 5983, but in the case at bar the policy required that demand be made for a paid-up policy within six months after default in the payment of premium, before the holder was entitled to a paid-up policy. Whether the holder would exercise that right or not was discretionary with him and not for defendant to decide for him. It follows that the policy in suit is not governed by section 5986.

It is, however, controlled by sections 5983 and 5985.

By section 5983 three-fourths of the net reserve is applied on the policy as a single premium, which continues the full amount of the policy in force and then prescribes a rule for fixing the term for which such temporary insurance shall be in force.

By section 5985 it is provided that if the death of the assured occur within the term of temporary insurance covered by the policy the company shall be bound to pay the amount of the policy, less the unpaid premiums, with compound interest thereon at six per cent.

99 The policy was a fifteen-year payment life, issued May 11, 1887, for $10,000; age of the assured at that time was 49 years. Four annual premiums of $589.50 were paid on it, default being made in the payment of the premium which fell due May 11, 1891. Its net value, based upon American experience table of mortality, with interest at 4½ per cent. at the date of default in

payment of premium, was $1,957.21. Under section 5983 of the statutes three-fourths of the net value, or $1,467.91, is applied as a single premium for temporary insurance at the attained age of the insured at the time of default in payment of premium.

The insured at time of default in premium in this case being 53 years old and the amount to be applied as a single premium for temporary insurance $1,467.91, the insurance is in force for a period of nine years and seventy-one days from date of lapse, May 11, 1891, and upon this basis plaintiff is entitled to recover.

It is well settled that the legislature of the State has the power to pass laws regulating and prescribing rules by which foreign insurance companies may do business in this State and to prohibit them from doing so altogether if so inclined. Paul *vs.* Virginia, 8 Wall., 168; State *vs.* Stone, *supra;* Hooper *vs.* California, 155 U. S., 648; Daggs *vs.* Insurance Co., *supra.* This case has recently been affirmed by the Supreme Court of the United States.

It logically follows that in passing the sections of the statute quoted the legislature did not exceed the powers conferred upon it by the State constitution, and that such legislation is not in conflict with any provision of the Constitution of the United States.

For these considerations we reverse the judgment and remand the cause, with directions to the court below to enter up judgment for plaintiff in the sum of $8,749.21, with interest thereon from November 30th, 1892, at six per cent. per annum, in accordance with the views herein expressed.

Gantt, C. J.; Sherwood, Brace, Robinson, JJ., concur; Marshall, J., absent; Valliant, J., not sitting.

G. D. BURGESS, *J.*

100 And on the same day the further following proceedings were had in said cause, viz:

FANNIE CRAVENS, Appellant,
vs.
NEW YORK LIFE INS. CO., Respondent.

Now, at this day, there is presented to Hon. James B. Gantt, chief justice, a writ of error to the Supreme Court of the United States; a citation directed to said appellant, citing and admonishing her to be and appear at a Supreme Court of the United States on the 20th day of April, 1899; an assignment of errors and a supersedeas bond in the sum of $25,000.00 *dollars;* which said writ of error is allowed, said citation signed, said assignment of errors filed, and said bond approved, ordered filed, and made a part of the record herein.

101 Which said assignment of errors is in words and figures as follows, to wit:

In the Supreme Court of the State of Missouri.

FANNIE CRAVENS, Defendant in Error,
vs.
THE NEW YORK LIFE INSURANCE COMPANY, Plaintiff in Error.

Now comes The New York Life Insurance Company, plaintiff in error in this cause from the Supreme Court of the United States to the supreme court of the State of Missouri, and says that in the record and proceedings in this cause there is manifest error, and said plaintiff in error makes this its assignment of errors herein:

First. The decision and judgment of the supreme court of the State of Missouri, in construing the statute of Missouri, sec. 5983 to 5986, R. S. 1879, as denying the right of the parties to the contract of insurance sued upon to agree upon the applicatory law of said contract, violated the right, privilege, and immunity of this plaintiff in error, protected by the Constitution of the United States and the fourteenth amendemnt thereof.

Second. The said statute of Missouri, as construed by said decision and judgment, is violative of the rights of this plaintiff in error under the Constitution of the United States and the fourteenth amendment thereof.

Third. The said statute of Missouri, as construed by said decision and judgment, making a new contract for the parties different from the contract made between the parties, is violative of the rights of this plaintiff in error under the Constitution of the United States and the fourteenth amendment thereof.

Fourth. The said statute of Missouri, as construed by the said decision and judgment, is an attempted regulation of commerce between the States.

102 Fifth. The said statute of Missouri, construed by said decision and judgment, denies plaintiff in error its contractual liberty without due process of law and is violative of the fourteenth amendment of the Constitution of the United States.

Sixth. The decision and judgment of the supreme court of Missouri is against the law.

Seventh. The decision and judgment of the supreme court of Missouri should have been in favor of this plaintiff in error, and the judgment of the circuit court herein should have been affirmed.

Wherefore this plaintiff in error filed this its assignment of error herein and prays that the judgment herein rendered by the supreme court of the State of Missouri be reversed.

F. N. JUDSON, *Attorney.*

And which said bond is in words and figures as follows, to wit:

Know all men by these presents that we, The New York Life Insurance Company, as principal, and Festus J. Wade, as surety, are held and firmly bound unto Fannie Cravens in the full and just sum of twenty-five thousand dollars ($25,000.00), to be paid to the said Fannie Cravens, her heirs, executors, administrators, and as-

signs; to which payment, well and truly to be made, we bind ourselves and our representatives jointly by these presents.

Sealed with our seals and dated this — day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, at the October term, A. D. 1898, in the supreme court of the State of Missouri, in a suit depending in said court between said Fannie Cravens, as plaintiff, appellant, and said New York Life Insurance Company, as defendant, respondent, said cause was reversed and remanded to the circuit court of Jackson county, with instructions to render judgment in favor of said Fannie Cravens and against said New York Life Insurance Company in the sum of eight thousand seven hundred forty-nine and $\frac{21}{100}$ dollars
103 ($8,749.21), with interest at six per cent. per annum from November 30th, 1892, and the New York Life Insurance Company has sued out a writ of error, returnable to the Supreme Court of the United States, to reverse the said judgment of the supreme court of Missouri, directed to the said supreme court of the State of Missouri, and a citation has been directed to the said Fannie Cravens, citing and admonishing her to be and appear in the Supreme Court of the United States, in the city of Washington, on the second Monday in October, 1899, now, the condition of the above obligation is such that if the said New York Life Insurance Company shall prosecute said writ of error to effect and answer all damages and costs, if it fails to make good said plea, then the above obligations to be void; otherwise to remain in full force and virtue.

NEW YORK LIFE INSURANCE COMPANY,
By F. N. JUDSON, *Attorney.*
FESTUS J. WADE.

Approved:
JAS. B. GANTT,
Chief Justice.

O K.
W. B. C. BROWN.

STATE OF MISSOURI, *sct:*

I, Jno. R. Green, clerk of the supreme court of the State of Missouri, certify that the foregoing is a full, true, and complete transcript of the record and proceedings in the case of Fannie Cravens against The New York Life Insurance Company as fully and complete as the same appear of record and on file in my said office.

In witness whereof I have hereunto set my hand as clerk and affixed the seal of said court. Done at office, in the city of Jefferson, this 23rd day of March, A. D. 1899.

[Seal of the Supreme Court of Missouri.]

JNO. R. GREEN, *Clerk.*

Endorsed on cover: File No., 17,368. Missouri supreme court. Term No., 262. The New York Life Insurance Company, plaintiff in error, *vs.* Fannie Cravens. Filed April 14th, 1899.

No. 262.

In the Supreme Court U.S.
October Term, 1890.
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1890.

NEW YORK LIFE INSURANCE COMPANY,
Plaintiff in Error,
vs.
FANNIE CRAVENS,
Defendant in Error.

No. 262.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT, ASSIGNMENTS OF ERROR AND BRIEF FOR PLAINTIFF IN ERROR.

FREDERICK N. JUDSON,
For Plaintiff in Error.

GEO. W. HUBBELL,
Of Counsel.

W. J. HERR, 204 OLIVE ST.

INDEX.

	Page.
STATEMENT,	1–12
The pleadings,	7
The statute,	8–10
ASSIGNMENT OF ERRORS,	12
BRIEF,	14–24
ARGUMENT,	25–94
Federal question involved,	25
The New York law expressly adopted,	28
The will of the parties controlling,	29–35
Applied in Insurance contracts,	31–33
New York Notice Law cases,	36–39
Selection of Law of Incorporating State enforced	40–42
Option of applicatory law given to plaintiff,	43
Right of choice in good faith of foreign law illustrated in case of usury laws,	44–50
Qualifications of choice of foreign law,	51
Selection of the New York law reasonable and in good faith,	52–54
N. Y. Law necessitated by Tontine plan,	55–56
Parties presumed to have contracted with reference to New York law,	57–59
Selection of New York law not in violation of public policy of Missouri,	60–62
The policy in suit an inter-state contract,	63–65
Plaintiff in error not made a domestic company,	65–69
Right of choice of applicatory law essential to an inter-state contract,	69–72
The statute as construed makes a new contract for the parties,	73–76
The statute as construed violative of the constitutional guaranty,	77–81
The Supreme Court of Missouri on Contractual Liberty,	79–80
No judicial precedent for sustaining constitutionality of statute as construed,	82
Ins. Co. vs. Clements, 140 U. S. 226, distinguished	83
Attempted regulation of inter-state commerce,	86
Paul vs. Virginia distinguished,	87
Contention not prejudicial to the just authority of the State,	91

IN THE

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OCTOBER TERM, 1899.

NEW YORK LIFE INSURANCE COMPANY,
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No. 262.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT, ASSIGNMENTS OF ERROR AND BRIEF FOR PLAINTIFF IN ERROR.

This is a suit upon a policy of life insurance for ten thousand dollars, issued by plaintiff in error upon the life of J. K. Cravens, deceased. The issue presented upon the pleadings and an agreed statement of facts, whereon the cause was submitted to the trial court, was whether defendant in error, as beneficiary in the policy in suit, was entitled, upon the admitted default, after payment of four annual premiums, to the amount of commuted insurance

provided in the policy and tendered by plaintiff in error, to-wit, twenty-six hundred and seventy dollars ($2670), or, as claimed by the defendant in error, to extended insurance, as set forth in Section 5983, Revised Statutes of Missouri, 1889—that is, to the face of the policy, less unpaid premiums. The Circuit Court gave judgment for the former sum, in accordance with the contention of plaintiff in error, being the amount tendered in its answer. But this judgment was reversed by the Supreme Court of Missouri, which directed judgment to be entered for defendant in error for the full amount claimed, to-wit, eighty-seven hundred and forty-nine dollars and twenty-one cents ($8749.21).

There was no controversy as to the facts, the case being submitted to the trial court upon the pleadings and agreed statement of facts, and the material parts thereof are as follows:

Plaintiff in error was a mutual life insurance company, organized under the laws of the State of New York, without capital stock, and at the time of issuing the policy in question was engaged in the business of insuring lives, through branch offices situated in different States of this country and in foreign States, the company being conducted strictly upon the mutual plan, the premiums paid, less the expense of management, being administered solely for the benefit of the policy-holders.

In 1887 and many years prior thereto, plaintiff in error had maintained branch offices in the State of Missouri, employing agents to solicit applications for insurance from citizens of Missouri, having received a certificate of authority from the State Superintendent of Insurance, and during the year 1886 the amount of policies issued by plaintiff in error to citizens of Missouri was $1,617,985, while the total amount of insurance policies issued by plaintiff in error in that year to citizens of different States of the country and of foreign countries

aggregated $85,178,294—that the total amount of insurance in force on the lives of citizens of Missouri on December 3, 1886, was $8,886,542, while the total amount of policies in force in the United States and in foreign countries was $304,373,540.

On May 2, 1887, John K. Cravens, then a citizen of Kansas City, Missouri, made written application, through its local agent, to plaintiff in error for a policy of insurance upon his life, on the *non-forfeiture limited tontine* plan, with tontine period of fifteen (15) years, the payments to be completed in fifteen (15) annual payments. An abstract of this application is set out on the third page of the policy sued on. (See Rec., p. 22.) The application was signed by the insured, and by him for the beneficiary, and contains the following express agreement:

"2. That inasmuch as only the officers of the home "office of the said company in the City of New York have "authority to determine whether or not a policy shall issue "on any application, and as they act on the written state- "ments and representations referred to, no statements, "representations, promises, or information made or given "by or to the person soliciting or taking this application "for a policy, or by or to any other person, shall be bind- "ing on said company, or in any manner affect its rights, "unless such statements, representations, promises or "information, be reduced to writing and presented to "the officers of said company, at the home office in this "application. * * * "

"5. That the contract contained in such policy, and "in this application, shall be construed *according to the "laws of the State of New York*, the *place of said con- "tract* being agreed to be the *home office of said company* "in the *City of New York*."

This application thus signed was forwarded to the home office of the company in the *City of New York*, and *there*, upon consideration, was *accepted* and approved, and policy No. 250,213, was thereupon executed by the officers of the company at the home office, and trans-

mitted to Kansas City and there delivered to the insured, on the payment of the first annual premium to the local agent. An abstract of the written application upon which the policy was issued, was set out on the third page of the policy.

The non-forfeiting limited tontine policy, fifteen year endowment, with the limited premium return plan of insurance, which was selected by the applicant in the written application, was set forth in the policy, and the essence of the plan consisted in the fact that no dividend should be allowed or paid upon the policy unless the person insured should complete the *fifteen* year tontine dividend period, and *unless the policy should be then in force*, and that the surplus or profits derived from such policies of a class as should then be in force, should *be apportioned among* the *survivors of the tontine class*; that is to say, all the policies issued in that year of that class, were allowed at the expiration of the period, the option of taking their profits in the form of continued insurance or annuities, or cash, as they might prefer.

It appears from Section 14 of the agreed statement that the total number of policies belonging to this class, that is, issued upon this plan during the year 1887 by the company, issued to the residents of all the States and countries wherein the company did business, was five thousand one hundred and seventy-two (5172), covering aggregate insurance in the sum of twenty million one hundred fifty-four thousand nine hundred and eighty-one dollars ($20,154,981). The insured and the other policy-holders of this tontine class thus became entitled to *reciprocal rights*, in the *contingency of survivorship*, in surplus profits accruing to all the policies of the same class.

Policies of this tontine class were entitled to a grace of one monthin the payment of premiums. (Rec., p. 19.) The policy contained the following express condition and agreement as to paid up insurance in case of

default during the tontine period, being the same as that expressly set out in the application for the policy, and being a feature of the class of insurance specifically selected by the insured in his application. (Rec., p. 18.)

"If the premiums are not paid, as hereinafter pro-"vided, on or before the days when due, then this policy "shall become void, and all payments previously made "shall be forfeited to the company, except that if this "policy, after being enforced three full years, shall lapse "or become forfeited for the non payment of any prem-"iums, a *paid-up policy* will be issued on demand made "within six months after such lapse, with surrender of "this policy, under the same conditions as this policy, "except as to payment of premiums, but without partici-"pation in profits, for the amount equal *to as many "fifteenth parts of the sum above insured as there shall "have been complete annual premiums paid thereon*, when "said default in the payment of premium shall be made, "and all right, claim or interest arising under the statute "or otherwise, to or in any other paid up-up policy or "surrender value, and to or in any temporary insurance, "whether required or provided for by the statute of any "State, is hereby expressly waived or relinquished."

It was noted in the application (Rec., p. 24) that an affirmative answer to the question asking whether the foregoing was agreed to by the applicant, was a necessary condition to the issue of the policy.

The policy by its terms is payable at the home office of the company in the City of New York, and by its terms all premiums are payable at the home office of the company, but may be paid to agents producing receipts signed by the president, vice-president and actuary, and countersigned by the agents.

Mr. Cravens, the insured, paid the premiums upon the policy for four years, but made default in the payment due on May 11, 1891, and he died on November 2, 1892, leaving that and all subsequent premiums unpaid.

No question is made that the company complied with the service of notice of premium required by the law of New York then in force, that the provisions of the policy were in accordance with the law of New York, and that the policy was forfeited but for the claim under the Missouri statutes set up by the defendant in error.

It is conceded that the amount of paid-up insurance to which the policy was entitled according to the terms of the application and policy was $2670, this being the same amount required by the statute, (Section 5858 Revised Statutes of 1879) on that class of policies, and that no demand was made by or on behalf of the insured within six months after default on May 11, 1891, or at any time. The company, upon receiving notice of the death of the insured, offered to waive the failure to make such demand, and tendered the beneficiary, and continued the tender at the time of the trial, of the amount of the paid-up policy to which the policy would have been entitled if such demand had been made, to-wit, $2670, but defendant in error refused to accept it, and insisted upon her right to recover *extended* insurance under the Missouri statutes.

THE PLEADINGS.

The petition (Rec., p. 3) set out the issuance of the policy in May, 1887, the payment of four annual premiums, until May, 1891, the death of insured November 2, 1892, alleged that under the statute the insurance was extended, and was in force at date of death, and asked judgment for the face of the policy, less the unpaid premiums.

The answer (Rec., p. 6) of defendant set up in substance the foregoing provisions of the application and policy—claimed that defendant was a purely *mutual* com-

pany—that the law of New York was thus by agreement of the parties made the applicatory law of the contract—set up the default of 1891, after paying four annual premiums and tendered the sum of $2670, the amount of paid-up or commuted policy, to which the original policy was entitled by its terms on such default, waiving the failure to make demand therefor.

The answer also set up that *other policy-holders, i. e.*, the other members of the same tontine class, had each by the terms of their policy contracts acquired with defendant in error contingent and mutual interests in the profits and surplus to be derived from the premiums on all the policies of such tontine class, and that the company on the faith of the insured's contract had incurred obligations to the other members of the tontine class, and that defendant in error was now *estopped* from setting up any other or different claim under the policy.

The answer further set up that the statute of Missouri in relation to the non-forfeiture of life insurance policies did not apply and had no reference to the policy sued on, in that the said contract was made under and with reference to the laws of New York, and that the application for the policy was accepted in the State of New York, and that by the express agreement of the parties to the policy, and of all parties interested in the tontine class, the law of New York was made the applicatory law of the contract. It was further set up that the right to make the contract was a right guaranteed and secured by the Bill of Rights and Constitution of Missouri, and by the Constitution of the United States, and that if the statute relied upon by defendant in error was construed to apply to the policy and to nullify the agreement of the parties, upon the faith of which the policy was issued, and without which it would not have been issued, then the statute so construed was violative of the said constitutional right and

immunity secured to plaintiff in error by the Constitution of the State of Missouri and by the Constitution of the United States.

The Missouri Statute.

The sections of the Missouri statutes relied upon by defendant in error in the Circuit Court and construed by the Supreme Court of Missouri are as follows:

"SEC. 5856. POLICIES NON-FORFEITABLE—WHEN. "—No policies of insurance on life hereafter issued by "any life insurance company authorized to do business in "this State on and after the 1st day of August, A. D. "1879, shall, after payment upon it of two full annual "premiums, be forfeited or become void by reason of the "non-payment of premium thereon, but it shall be subject "to the following rules of commutation, to-wit: The net "value of the policy, when the premium becomes due and "is not paid, shall be computed upon the American exper- "ience table of mortality, with four and one-half per "cent. interest per annum, and after deducting from "three-fourths of such net value any notes and other "indebtedness to the company given on account of past "premium payments on said policy issued to the insured, "which indebtedness shall then be canceled; the balance "shall be taken as a single net premium for temporary "insurance for the full amount written in the policy, and "the term for which such temporary insurance shall be in "force shall be determined by the age of the person "whose life is insured at the time of default of premium, "and the default of premium and the assumption of mor- "tality, and interest aforesaid; but if the policy shall be "an endowment, payable at a certain time, or at death if "it should occur previously, then if what remains as "aforesaid shall exceed the net single premium for a pure "endowment term, for the full amount of the policy, such "excess shall be considered as a single net premium for "a pure endowment for so much as such premium will "purchase, determined by the age of the insured at date "of default in the payment of premium on the original "policy, and the table of mortality and table as aforesaid,

"which amount shall be paid at end of the original term "of endowment, if the insured shall then be alive."

"SEC. 5857. A PAID-UP POLICY MAY BE DETER- "MINED, WHEN.—At any time after the payment of two "or more full annual premiums, and not later than sixty "days from the beginning of the extended insurance pro- "vided in the preceding section, the legal holder of the "policy may demand of the company, and the company "shall issue its paid-up policy, which, in the case of "any ordinary life policy, shall be for such an amount "as the net value of the original policy at the age and "date of lapse, computed according to the actuaries' or "combined experience table of mortality, with interest at "the rate of four per cent per annum, without deduction "for indebtedness on account of said policy, will pur- "chase, applied as a single premium upon the table rates "of the company; and in case of a limited payment life "policy, or of a continued payment endowment policy, "payable at a certain time, or at death, it shall be for an "amount bearing such proportion to the amount of the "original policy as the number of such annual premiums "actually paid shall bear to the number of such annual pre- "miums stipulated to be paid: *Provided*, That from such "amount the company shall have the right to deduct the net "reversionary value of all indebtedness to the company on "account of such policy; *and provided further*, that the "policy-holder shall, at the time of making demand for "such paid-up policy, surrender the orignal policy, legally "discharged, at the parent office of the company."

"SEC. 5958. RULE OF PAYMENT ON COMMUTED POL- "ICY.—If the death of the insured occur within the term of "temporary insurance covered by the value of the policy "as determined by Section 5856, and if no condition of "the insurance other than the payment of premiums shall "have been violated by the insured, the company shall "be bound to pay the amount of the policy, the same as "if there had been no default in the payment of prem- "ium, anything in the policy notwithstanding; *Pro- "vided, however*, that notice of the claim and proof of the "death shall be submitted to the company in the same man- "ner as provided by the terms of the policy within ninety

"days after the decease of the insured; *and provided also*, "that the company shall have the right to deduct from the "amount insured in the policy the amount compounded "at six per cent. interest per annum of all the premiums "that had been forborne at the time of the decease, includ- "ing the whole of the year's premium in which the death "occurs, but such premiums shall in no case exceed the "ordinary life premium for the age at issue, with interest "as last aforesaid."

"SEC. 5859. THE FOREGOING PROVISIONS NOT "APPLICABLE, WHEN.—The three preceding sections "shall not be applicable in the followng cases, to-wit: If "the policy shall contain a provision for an unconditional "cash surrender value at least equal to the net single prem- "ium of the temporary insurance provided therefor, or "for the unconditional commutation of the policy to non- "forfeitable paid-up insurance for which the net value "shall be equal to that provided for in Section 5857, or "if the legal holder of the policy shall, within sixty days "after default of premium, surrender the policy and "accept from the company another form of policy, or if "the policy shall be surrendered to the company for a "consideration adequate in the judgment of the legal "holder thereof, then, and in any of the foregoing cases, "this Act shall not be applicable."

These sections being the same as sections 5983 to 5986 of the Revision of 1879, comprising what is known as the Non-Forfeiture Law of Missouri, the only change in the revision of 1889 being in a matter not involved in this case.

There is *no requirement* in the statutes of Missouri that foreign life insurance companies doing business in the State should *reincorporate as Missouri corporations*. On the contrary, the business of life insurance in the State is regulated by Article II, Chapter 89, General Statutes of 1889, Vol. II, pp. 1372 to 1387, and provision is made therein not only for the incorporation of domestic companies but for the issuance of licenses to foreign

companies. Each of the latter are required (Sec. 5842) to file with the State Insurance Department a duly certified copy of its *charter*, and to deposit with the Insurance Department of the State of Incorporation, or with the Insurance Department of Missouri, securities to the value of one hundred thousand dollars. Annual statement of business is required to be filed, and upon compliance with the foregoing provisions the foreign company receives from the Superintendent of Insurance a certificate of authority to do business in the State, which is annually renewed (Sections 5843 to 5847).

It was conceded by the agreed statement that if the Missouri statute was applicable to the policy, and if, further, the policy did not come within the exception of the statute, that then the defendant in error would be entitled to the amount claimed as extended insurance. It was also conceded that the value of a paid up policy provided by the policy, the amount whereof was tendered by plaintiff in error, to-wit, $2670, was equal in amount to the paid up insurance provided by the Missouri statute, and that plaintiff was only entitled to said sum, if the policy was held to be controlled by the law of New York.

It was contended by plaintiff in error in the Circuit Court that even if the policy was held to be a Missouri contract, and subject to the Missouri statutes, that it came within the exception of the statute providing for *paid-up* insurance in lieu of *temporary* insurance, and this amount was tendered by the plaintiff in error. This contention was sustained by the trial court, which rendered judgment for the amount thus tendered by the company, to-wit, $2670. An appeal was taken from this judgment by the defendant in error to the Supreme Court of Missouri. This court reversed the judgment of the Circuit Court, and ruled both questions involved in the case adversely to plaintiff in error. See opinion of Court (Rec., pp. 49 to 64).

The court held that the provision for paid-up insur-

ance in the statute was not applicable; that the policy was a *Missouri* contract, *made so* by force of the statute, which operated to *override the express agreement of the parties* upon the New York law as the applicatory law; that the statute made the policy a Missouri contract, and "being a Missouri contract, the statute then in force with reference to the subject matter of the contract entered into and became a part thereof, as much so as if copied therein." And the court denied the contention of plaintiff in error that the statute so construed would be violative of the Constitution of the United States. The court, therefore, reversed the judgment of the Circuit Court, and directed judgment against the plaintiff in error for the full amount claimed, to-wit, $8749.21, with interest from November 30, 1892.

The plaintiff in error having ineffectually moved for a rehearing, (Rec., pp. 46 and 47) setting up that the statute as construed by the court was violative of the Constitution of the United States, in that it destroyed the contractual liberty of the parties and made a new contract for them, and that the court's construction of the statute was destructive of the right of contractual association in mutual life insurance, was allowed a writ of error to this court.

The assignments of error, (Rec., p. 65) filed with the writ of error, are as follows:

Assignments of Error.

First. The decision and judgment of the Supreme Court of the State of Missouri, in construing the Statute of Missouri, Secs. 5983 to 5986, Rev. Stat., 1879, as denying the right to the parties to the contract of insurance sued upon to agree upon the applicatory law of said contract, violated the right, privilege, and immunity of this plaintiff in error, protected by the Constitution of the United States, and the fourteenth amendment thereof.

Second. The said statute of Missouri, as construed by said decision and judgment, is violative of the rights of this plaintiff in error under the Constitution of the United States and the fourteenth amendment thereof.

Third. The said statute of Missouri, as construed by said decision and judgment, making a new contract for the parties different from the contract made between the parties, is violative of the rights of this plaintiff in error under the Constitution of the United States and the fourteenth amendment thereof.

Fourth. The said statute of Missouri, as construed by the said decision and judgment, is an attempted regulation of commerce between the States.

Fifth. The said statute of Missouri, construed by said decision and judgment, denies plaintiff in error its contractual liberty without due process of law and is violative of the fourteenth amendment of the Constitution of the United States.

Sixth. The decision and judgment of the Supreme Court of Missouri is against the law.

Seventh. The decision and judgment of the Supreme Court of Missouri should have been in favor of this plaintiff in error, and the judgment of the Circuit Court herein should have been affirmed.

Wherefore this plaintiff in error filed this, its assignments of error herein, and prays that the judgment herein rendered by the Supreme Court of the State of Missouri be reversed.

POINTS.

I.

The statute of Missouri, as construed by the Supreme Court of that State, denying the contractual liberty of the parties to an interstate contract of mutual life insurance in determining in good faith the applicatory law of that contract, was violative of the contractual liberty secured by the Fourteenth Amendment of the Constitution of the United States, and a Federal question is thereby presented to this court.

Allgeyer vs. Louisiana. 165 U. S., 585.

The judgment of the Supreme Court of Missouri, directing judgment by the Circuit Court, was final, within the meaning of the judiciary act.

Mower vs. Fletcher, 114 U. S., 127.

II.

The applicatory law of an interstate contract is that with reference to which the parties contract, and in the case at bar, the law of New York was made the applicatory law of the policy, by the express agreement of the parties.

Wharton on Conflict of Laws, Sec. 12 and Sec. 426;

Story on Conflict of Laws, Sec. 272;

Dicey on Conflict of Laws, Sec. 567;

Robertson vs. Bland, 2 Burr, 1077;

Phillimore, 4 Int., 469;

Wayman vs. Southard, 10 Wheat, 1;

Scudder vs. Union Bank, 91 U. S., 406;

Cox vs. United States, 6 Peters, 172;

LaMar vs. Micou, 114 U. S., 218;

Watts vs. Camors, 115 U. S., 353,362;

Pritchard vs. Norton, 126 U. S., 124;

Washington Central Bank vs. Hume, 128 U. S., 195;

Liverpool Steam Co. vs. Phœnix Ins. Co., 129 U. S., 397;

Coglan vs. S. Carolina R. R. Co., 142 U. S., 109;

Shattuck vs. Ins. Co., 4 Clifford, 498;

Desnoyes vs. Insurance Co., 7 Ins. Law Journal, 918;

Lamb vs. Bowser, 7 Bissell, 315;

Parkin vs. Royal Exchange Co., 8 Ct. Ses., 2d Series, 465;

Russell vs. Mutual Benefit Ins. Co., 23 N. Y., 516;

Hyde vs. Goodnow, 3 N. Y., 25;

Voorhies vs. Peoples Mut. Ben. Society, 91 Mich., 469;

Thompson vs. Ketchum, 8 Johns Cas., 189;

Griesmer vs. Mutual Life Ins. Co., 10 Wash., 203;

Insurance Co. vs. Savings Bank, 19 C. C. A., 286;

American Credit Indemnity Co. vs. Carrollton Co. (2nd Circuit), 36 C. C., A. 671.

III.

This principle of universal law, that the applicatory law of an interstate contract is that with reference to which the parties have contracted, has been uniformly adopted and enforced by the courts of the different States and also by the Federal Courts, against life insurance companies doing business in such States, construing the provisions of the statutory law of the State of incorporation as entering into the policy-contracts of the parties.

Mutual Life Ins. Co., vs. Phinney, now pending in this court;

Equitable Life Assurance Society vs. Nixon, 26 C. C. A., 620;

Same vs. Trimble, 27 C. C. A., 404;

Mutual Life Ins. Co. vs. Hill (9th Cir.) 97 Fed. Rep., 263;

New York Life Ins. Co. vs. Dingley (9th Cir.) 93 Fed. Rep., 153; 35 C. C., A 215;

McConnell vs. Ins. Co. (6th Cir.) 34 C. C., A. 663.

Rosenplater vs. Prov. Sav. Life Ass'n (6th Cir.) 37 C. C. A, 568;

Hathaway vs. Mutual Life Ins. Co., (Circ. Court, Washington) 99 Fed. Rep., 534.

Muller vs. Ins. Co., 89 Texas, 261;

Smith vs. New York Life Ins. Co., (Texas) 41, S. W. R., 680;

Harrington vs. Home Life Ins. Co., Cal. 58, Pac. Rep., 180;

Griffith vs. New York Life Ins. Co., 101 Cal., 627;

Osborne vs. Ins. Co., 123, Cal., 610;

Johnson vs. New York Life Ins. Co. (Iowa), 78 N. W., 905;

Trimble vs. Ins. Co., 20 Wash., 386;

Warner vs. Association, 100 Mich., 157;

Bamholzer vs. New York Life Ins. Co., 74 Minn., 387;

Nall vs. Insurance Co. (Tenn.) 54 S. W. R., 109;

Insurance Co. vs. Ficklin, 74 Md,, 172;

Equitable Life Association vs. Trombold, 75 Ill. App., 43;

Seiders vs. Insurance Co., (Texas) 54 S. W. Rep., 753; reversing Civil Court of Appeals, 51 S. W. R., 547;

Linn vs. New York Life Ins. Co., 78 Mo. App., 192;

American Credit Co. vs. Carrollton, *supra.*

Rorer Interstate Law (2nd Ed.), pp. 110, 111;

Wharton, Conflict of Laws (2nd Ed.), Sec. 427.

IV.

Parties to an interstate contract may contract in good faith for the law of the State of either, and the law thus agreed upon will be enforced in the other State as the law of the contract, although the domestic law of such State, which but for such agreement would have been the law of the contract, may be incapable of waiver. This is clearly illustrated in the case of usury laws in interstate contracts.

Freeland vs. Hern, 7. Cranch, 147;

Andrews vs. Pond, 13 Pet., 65;

Miller vs. Tiffany, 1 Wal., 298;

Johnson Bank vs. Bank of Ashland, 12 Wal., 266;

Story on Conflict of Laws, Sec. 304a and b;

McAllister vs. Smith, 17 Ills., 328, 65 Am. Dec. 651;

Smith vs. Muncie Nat. Bank, 29 Ind., 158;

2 Kent's Commentaries (13th Ed.), 459;

Smith vs. Parsons, 55 Minn., 521;

Hubbell vs. Morristown Co., 11 Pickle (Tenn.), 585;

Dygert vs. Vermont Loan & Trust Co., 9th Cir. 37 C. C. A. 389;

2 Parsons on Contracts, 95;

U. S. Savings & Loan Assoc. vs. Shain, 77 N. W. Rep., 1006;

Bank of Louisville vs. Young, 37 Mo., 407;

Insurance Co. vs. Simons, 52 Mo. App., 357;

Hysinger vs. Supreme Lodge, 42 Mo. App., 627;

This analogy of cases involving usury laws in interstate contracts applied to an interstate mutual life insurance contract in Seiders vs. Insurance Co. (Texas), 54 S. W. R., 753.

V.

This principle of universal law, whereunder parties to an interstate contract involving a choice of laws may select the applicatory law, is subject to two qualifications:

(*a*) That the choice is made in good faith and in

furtherance of the purposes of the contract, and not as an evasion of the local law; and

(*b*) That the foreign law agreed upon must not be prejudicial to the interests of the State where sought to be enforced, or violative of its public policy.

See authorities, *supra*.

VI.

The selection of the law of New York as the applicatory law of the interstate contract evidenced by the policy in suit, was reasonable and in furtherance of and indeed necessitated by the purposes of the contract, and was in no wise an attempted evasion of the laws of Missouri.

Wharton on Conflict of Laws, (2nd Ed.) 465;

2 May on Insurance, (2nd Ed.) Sec. 568;

Smith vs. N. Y. Life Ins. Co., 14 Allen 336;

Relf vs. Rundle, 103 U. S. 322;

N. Y. Life Ins. Co. vs. Statham, 93 U. S. 31.

VII.

The selection of the New York law as the applicatory law of the contract was necessitated by the nature of the contract and emphasized by the plan of insurance embodied therein, whereunder the other members of the tontine class acquired interests therein in consideration of the contingent interest enjoyed by the insured during his life in the policy contracts of his associates in the same class, and defendant in error as his representative, is therefore now estopped from asserting any other or different claim from that fixed under the law thus selected.

Century Dictionary, title "Tontine;"

Bogardus vs. Ins. Co., 101 N. Y., 329.

VIII.

As the selection of the New York law was necessary to the contract made by the parties—that is, to the tontine plan of insurance duly selected and adopted—it follows that even if there had been no express reference to the New York law, the parties would be presumed to have contracted with reference to that law.

Phillimore, 4th Int. 469, *supra;*

Pritchard vs. Norton, *supra;*

Wharton on Conflict of Laws, Sec. 507;

Gibson vs. Insurance Co., 77 Fed. Rep. 561.

IX.

The selection of the New York law as the applicatory law of the contract, being thus in furtherance of and necessitated by the contract, and the plan of insurance embodied therein, was in no wise in violation of Missouri law, or prejudicial to the interests of the State.

Session Acs of Missouri, 1895, p. 97;

Kerwin vs. Dolan, 29 Mo. App., 397.

See authorities, *supra.*

X.

Conceding that plaintiff in error, as a life insurance company of New York, was doing business in Missouri through the comity of the State, this did not disable the parties to this interstate contract from contracting in good faith under the foregoing rules of universal law, in furtherance of the purposes of their contract, as to the applicatory law thereof. This admission by comity did not make plaintiff in error a domestic corporation, and its

contracts with the citizens of Missouri are interstate contracts, governed by the foregoing rules of universal law.

Cooper Mfg. Co. vs. Ferguson, 113 U. S., 727;

Santa Clara County vs. So. Pac. R. R. Co., 118 U. S., 396;

Pembina Mining Co. vs. Pennsylvania, 125 U. S., 181;

Manhattan Life Ins. Co. vs. Fields (Texas), 62 S. W. R., 280;

Canada Southern R. R. Co. vs. Gebhard, 109 U. S., 527;

Louisville, Etc. R. R. Co. vs. Trust Co., 174 U. S., 552.

XI.

This right of choice of the applicatory law, subject to the foregoing qualifications, is inherent in the conception of an interstate contract, and the statute of Missouri, as construed by the Supreme Court of that State, deprives the parties to an interstate mutual life insurance contract of this essential element of the right of interstate contract.

Dicey on Conflict of Laws, p. 570;

Hubbell vs. Morristown Land & Improvement Co., *supra*;

Wayman vs. Southard, *supra*;

Horton vs. N. Y. Life Ins. Co., 151 Mo., 604.

XII.

The statute of Missouri, as construed by the Supreme Court, not only denies to the contracting parties, in making an interstate contract, the right of choice of the applicatory law, but makes a new contract for the parties

which they would not have made and contrary to their intent.

Ogden vs. Saunders, 12 Wheat., 258;

Keating vs. City of Kansas, 84 Mo., 415;

Ashbrook vs. Dale, 27 Mo. App., 649;

State to use of Wolf vs. Berning, 74 Mo., 87;

Reed vs. Painter, 129 Mo., 680;

Straube vs. Ins. Co., 123 Cal., 677.

XIII.

The selection in good faith of the applicatory law is an essential incident to the right of interstate contract, and the Missouri statute construed by the Supreme Court as denying this liberty of contract in this essential incident of interstate contract and making a new contract for the parties, violative of their intent, is violative of the constitutional guaranty of liberty of contract in the Fourteenth Amendment, which includes the right, thus denied, as essential to the right of interstate contract.

Allgeyer vs. Louisiana, *supra;*

Frisby vs. United States, 157 U. S., 160;

Holden vs. Hardy, 169 U. S.. 366;

State vs. Loomis, 115 Mo., 307;

State vs. Julow, 129 Mo., 163;

Millet vs. People, 117 Ill.; 294.

Trover vs. People, 141 Ill., 171;

Ramsey vs. People, 142 Ill., 380;

Braceville Coal Co. vs. People, 147 Ill., 66;

Richey vs. People, 154 Ill., 98;

Commonwealth vs. Perry, 155 Mass., 117;

Ex parte Ruback, 85 Cal., 274;

Johnson vs. Goodyear Mining Co., Cal., 59 Pac. Rep., 304;

Goodcharles vs. Wiseman, 113 Pa., 431;

Ex parte Jacobs, 98 N. Y., 98;

People vs. Marks, 99 N. Y., 377;

People vs. Gibson, 109 N. Y., 389;

State vs. Goodwell, 33 W. Va., 179;

Low vs. Reese Printing Co., 48 Neb., 127;

State vs. Sangle, 51 N. W. Rep., 858;

Harding vs. People, 160 Ill., 459;

XIV.

There is no judicial precedent sustaining the contention of defendant in error.

Equitable Life Ins. Co. vs. Clements, 140 U. S., 226;

Fletcher vs. N. Y. Life Ins. Co., 117 U. S., 519;

Maier vs. Ins. Co., 78 Fed. Rep., 566;

Paul vs. Virginia, 8 Wal., 168;

Insurance Co. vs. Daggs, 172 U. S., 557;

Washington Bank vs. Hume, 128 U. S., 195;

Pritchard vs. Norton, 126 U. S., 124;

Seidener vs. Merchants Life Ins. Soc., 54 S. W. Rep., 753 (Texas).

XV.

The Missouri statute as construed by the Supreme Court of that State, denying the right to select in good

faith the applicatory law of a contract of a mutual interstate life insurance, and making a new official contract violative of the intent of the parties, thus essentially denying the right to make interstate contracts of life insurance, was in effect an attempted regulation of commerce between the States.

Liverpool Ins. Co. vs. Mass., 10 Wallace, 573;

Statham vs. Insurance Co., *supra;*

Paul vs. Virginia, 8 Wallace, *supra;*

Addyston Pipe and Steel Co. vs. U. S., 175 U. S., 211;

Story on Conflict of Laws, Sec. 242;

In re Debs., 158 U. S., 564.

XVI.

The assertion of the constitutional protection of the right of interstate contract in mutual life insurance, and of the right of choice therein in good faith of the proper law of such contract under the rules of universal law, in no wise impairs the just authority of the State in the exercise of its legitimate police power, or in its control over foreign corporations doing business through comity in the State.

See authorities, *supra.*

XVII.

The judgment of the Supreme Court of Missouri should be reversed.

See authorities, *supra.*

ARGUMENT.

I.

The statute of Missouri as construed by the Supreme Court of that State, denying the contractual liberty of the parties to an inter-state contract of mutual life insurance in determining in good faith the applicatory law of that contract, was violative of the contractual liberty secured by the Fourteenth Amendment of the Constitution of the United States, and a federal question is thereby presented to this court.

The case as presented in the State Court involved both the construction and the constitutionality of the Missouri statute. It was there contended by this plaintiff in error, that the policy of insurance sued upon was governed by the New York law, the parties having expressly contracted with reference to that law, and that such agreement was made in good faith, not for the purpose of evading the Missouri law, but for the purpose of agreeing upon one applicatory law to govern engagements to which citizens of different States were parties. But it was also contended by plaintiff in error, the federal right being expressly set up in its answer, that if the statute was so construed as to deny the liberty of contract to the parties in this regard, it would be unconstitutional under the Federal as well as the State Constitution. The Supreme Court of Missouri, in directing judgment for the full amount claimed by defendant in error—(reversing the Circuit Court, which held that the policy was within the exception to the statute, in that it gave the insured the same *paid-up* value that the statute did)—necessarily and expressly decided both of these contentions against plaintiff in error. That is, that the policy was under the

statute and that it was a Missouri contract, being *made* so by the statute, which set aside the express agreement of the parties for the New York law. In other words the statute was read into the contract, *because* it was a *Missouri contract*, and it was made a Missouri contract *because* of the *statute*. Thus the court says (p. 57 of Rec.), referring to the case of Equitable Life Assurance Society vs. Clements, 140 U. S., 56, where the policy was held to be a Missouri contract upon the facts in evidence, there being no evidence of the acceptance of the application in New York, or of the agreement of the parties upon the applicatory law:

"It is true there was no express provision in the con-
"tract which formed the basis of the Clement suit, *supra*,
"as there is in the case at bar with respect to the State by
"whose laws the contract should be construed, or as to
"the place of contract; but defendant was at the time of
"the execution of the contract doing business in this State
"*ex gratia* and could not with respect to such business
"avoid the statute of this State, or withdraw itself from
"its operation by the insertion of clauses in its policy.
" * * * And p. 58:

"It is therefore concluded that the contract is a Mis-
"souri contract, governed by the laws of this State.

"Being a Missouri contract, the statute then in force
"with respect to the subject-matter of the contract entered
"into and became a part thereof as much as if copied
"therein."

The court thereafter holds (Rec., p. 64), after thus construing the statute, that it was not unconstitutional either under the State or Federal constitutions.

Assuming, therefore, as we are bound to do under the repeated decisions of this court, that the State court correctly construed its own statute and constitution, the statute so construed is violative of the liberty of contract guaranteed to this plaintiff in error, as to all other persons, by the Fourteenth Amendment of the Constitution of the United States, and the statute so construed is essentially

destructive of the principle of *mutual* life insurance, and *a fortiori* of *tontine* life insurance, which *requires* one applicatory law for administration, and this denial of the contractual liberty of the parties, and making a new contract for them, which they would not have made, was in effect an attempted regulation of commerce between the States, in violation of the Federal Constitution.

And the jurisdiction of this court is therefore invoked, on the ground that the statute as construed by the Missouri Supreme Court is violative of the federal rights thus duly claimed by plaintiff in error. The case of Allgeyer vs. Louisiana (165 U. S., 586), is directly in point. There the court accepted the construction of the Supreme Court of Louisiana of the statute, and held that *so construed* it was a violation of the fourteenth amendment of the constitution, in that it deprived defendants of their liberty without due process of law, in making insurance contracts with foreign insurance companies, the court saying:

"The statute which so forbids such an act does not "become due process of law, because it is inconsistent "with the Constitution of the Union. The liberty men- "tioned in that amendment means, not only that the citi- "zen shall be free from mere physical restraint of his per- "son, as by incarceration, but the term is deemed to "embrace the right of the citizen to be free in the enjoy- "ment of all his faculties; to be free to use them in all law- "ful ways; to live and work where he will; to earn his "livelihood by any lawful calling; to pursue any liveli- "hood or avocation, and for that purpose to enter into all "contracts which may be proper, necessary and essential "to his carrying out to a successful conclusion the pur- "poses above mentioned.

* * * "Such a statute as this in question is not "due process of law, because it prohibits an act which "under the Federal Constitution the defendant had a right "to perform."

The judgment of the Supreme Court of Missouri, reversing the judgment of the Circuit Court, remanding the case and directing the entry of judgment for a stated amount against plaintiff in error, was a *final* judgment within the meaning of the judiciary act. (See Mower vs. Fletcher, 114 U. S., 127.)

II.

The applicatory law of a contract is that with reference to which the parties contract, and in the case at bar the statute of New York was made the applicatory law of the policy by the express agreement of the parties.

Before considering the single ground upon which the statute thus construed is sought to be sustained, to-wit, as a consequence of the comity whereunder it is claimed plaintiff in error was permitted to do business in the State, it is proper to consider the fundamental rules whereunder the applicatory law of contracts between citizens of different jurisdictions is determined.

It will be conceded that the contract evidenced by this policy of insurance, as every other, must have one applicatory law whereby the rights and obligations of the parties to the contract are determined. This applicatory law is determined by the principles of private international law; and these principles are adopted by our common law, because in the language of Mr. Wharton (Wharton on Conflict of Laws, Sec. 1*a*): "Our common law incorporates the rules of private international law in all cases where they will apply."

There cannot be *two* applicatory laws determining the rights and obligations of the parties to the same contract. It is utterly inconceivable that defendant in error should have an *option* as to the applicatory law of the contract. He may elect as to his forum, says Mr. Wharton (Sec.

426, Wharton on Conflict of Laws), any jurisdiction as a rule, where the defendant or his property may be found.

"But as to the applicatory local law, according to "Savigny, the plaintiff has no election. There are no "two such statutes between which he may choose. It "would be gross injustice to the defendant, as well as a "discredit to the law itself, remarks this great jurist, if "such an election were allowed. Each case has, in right, "its own particular law which attaches to it when it arises "by the assent of the parties, which law continues always "to envelope it; and such law must be applied, as a gen-"eral rule, by every court to which the plaintiff may "appeal."

The fundamental rules of private international law, or conflict of laws, under which the applicatory law of contracts is determined, are well settled. In the absence of direct evidence of intention, a contract is held to be governed by the law of the place where made, as the parties are *presumed* to have contracted with reference to that law. (Story on Conflict of Laws, Sec. 272.) In many instances the law of the place of performance, the *lex loci solutionis* becomes applicatory law, because the parties are presumed to have contracted with reference to that law.

In other words, the applicatory law is applied according to the *presumed intent* of the parties. It was declared by Lord Mansfield in Robertson vs. Bland, 2 Burr, 1074, that "The law of the place can never be the rule where "the contract was entered into with the expressed view of "the law of another country as the law by which it was to "be governed."

And Phillimore, 4 Int., 469:

"It is always to be remembered that in obligations it "is the *will* of the contracting parties, and not the law, "which fixes the place of fulfilment; whether that law be "fixed by express words or decided by implication as the

"place of the jurisdiction to which the parties selected to "submit themselves."

Dicey, on Conflict of Laws, p. 567, says:

"When the intention of the parties to a contract, as to "the law governing the contract, is expressed in words, "this expressed intention determines the proper law of the "contract, and, in general, overrides every presumption."

And at page 560:

"The law of the place of contract, *lex loci contractus*, "and of the place of performance, *lex loci solutionis*, are "both of them presumptions grounded on the probable "intention of the parties."

The authorities on this subject are fully reviewed by this court in Pritchard vs. Norton, 106 U. S., 124 (see pp. 136 and 137.) The applicatory law, says the court, is that which the *parties* have either expressly or presumptively incorporated in their contract as constituting its obligation. It has never been better described than it was incidentally by Chief Justice Marshall in Wayman vs. Southard, 10 Wheaton, 1, where it is defined as a principle of *universal law*, the principle that in any other forum the contract is governed by the law with a view to which it was made.

In the absence of direct evidence of intention, courts must look into and give effect to the *acts* of the parties, in determining their presumed intent as to the applicatory law of a contract. Thus, in insurance cases, the place where the application was signed, where the application was accepted, of the countersigning by local agent, and the place of payment have all been given effect in determining therefrom the *situs* of the contract; but it has been uniformly held, in accordance with the rule relating to the formation of contracts by correspondence, that where the application is forwarded for acceptance in another State and there accepted, there being no power

in the local agent to complete the contract, that the place of the acceptance of the application is the place of the contract.

See:

Shattuck vs. Mut. Life Ins. Co., 4 Clifford, 598.

Desnoyes vs. Mut. Benefit Life Ins. Co., 7 Ins. Law J., 918; (3 Am. & Eng. Ency. of Law, 551).

Lamb, Assignee, vs. Bowser, 7 Bissell, 315.

Parkin vs. Royal Exchange Assurance Co., 8 Ct. of Sessions, 2nd Series, 465.

Russell vs. Mut. Benefit Life Ins. Co., 23 N. Y., 516.

Maiden vs. Ins. Co., 85 Iowa, 585.

In this last case it was held that although the plaintiff resided in Georgia, but the assured was a resident of Florida, that there was nothing to show that the parties contracted with special reference to the laws of Georgia, and therefore the law of New Jersey, the place of the company's office, was the applicatory law.

See also Hyde vs. Goodnow, 3 N. Y., 25.

In Parkin vs. R. Ex. A. Co., *supra*, a domiciled Scotchman made application for insurance through agents in Edinburgh to an English company and thereafter received the policy which was delivered through the Edinburgh agent, who collected the premiums. Lord Cockburn said: "I can scarcely conceive of a contract more devoid of Scotch features, or more deeply embraced with all the features of the laws of England." The English law was therefore held applicable, according to

which interest could be demanded upon the sum in the policy.

In Voorhees vs. Peoples Mutual Ben. Soc., (Mich.) 91 Mich., 469, the company, an Indiana company, denied liability because of non-compliance with the laws of Michigan. The by-laws endorsed upon the policy provided that it could have no force until approved by such examination at home office, and it was agreed in the application that "contract shall be considered as having "been entered into at Elkhart, Indiana, and shall be gov- "erned by and construed in accordance with the laws of "said State." The court held that this made the policy an Indiana contract, and that the law of Michigan did not apply.

In Griesmer vs. Mutual Life Ins. Co. of N. Y., 10 Washington, 203 (1894), where the policy provided that "it is a contract made and to be executed under laws of "State of New York, and shall be construed only accord- "ing to the charter of the company and the laws of that "State." The court held that it must be construed as executed and delivered in that State, although in fact it was issued upon application taken in another State and there delivered. The court saying, page 208:

"It is however within the power of contracting par- "ties, by the express terms of their contract, to establish "the place where it shall take effect, and under what laws "it shall be construed. If anything appears in the appli- "cation upon which this policy was issued, or in the "policy itself, that discloses an intention to locate the "contract in any other State than the one in which it was "actually made and delivered, *such intention must be given* "*force*, and if sufficient will have the effect, so far as the "construction of the contract is concerned, to change the "place of the execution to correspond with the intention "of the parties."

In Penn. Mutual Life Ins. Co. vs. Mechanics' Savings Bank and Trust Co., 6th Cir. U. S. Ct. of Ap., Feb. 4, 1896, (72 Fed. R., pp. 413, 414; 19 C. C. A., p. 286),

in a very learned and able opinion by Judge Taft, the court said:

"There can be no doubt that this policy is to be con-"strued according to the laws of Pennsylvania. It is "expressly provided in the application, which is made "part of the policy, 'that the place of contract shall be the "'City of Philadelphia, State of Pennsylvania.' In Way-"man vs. Southard, 10 Wheaton, 1–48, Chief Justice "Marshall stated it to be a principle of universal law, that "in every policy a contract is governed by the law, with "a view to which it is made. (See Pritchard vs. Norton, "106 U. S., 124–136; 1 Sup. Ct., 102, and cases cited.)"

In Washington Central Bank vs. Hume, 128 U. S., 195, there was involved the distribution of the proceeds of a policy issued by a Connecticut company to a citizen of Washington. It was expressly provided as a part of the contract that the policy was issued and delivered at Hartford, in the State of Connecticut, was to be in all respects construed and determined in accordance with the laws of that State. The court said:

"The rights and benefits given by law of Connecti-"cut are as much a part of these contracts as if incorpor-"ated therein, not only because they are to be taken as if "entered into them, but because that was the place of "performance, and the stipulation of the parties was made "with reference to the laws of that place."

There is nothing in the case of Insurance Society vs. Clements, 140 U. S., 226, contrary to this fundamental principle. There the court held the contract *under the facts in evidence*, there being no evidence of the acceptance of the application in New York, and no express agreement of the parties as to the applicatory law, to be a Missouri contract, and the Missouri statute was held applicable, because the policy was a Missouri contract. In other words, the principles of universal law were applied to the facts of the case, and therefrom the intent

of the parties as to the applicatory law was presumed. This is the view taken of this case in Equitable Life Assurance Society vs. Nixon, 26 C. C. A., 620, 81 Fed. Rep., 796, where there was no express agreement upon the New York law, but the proof showed that the risk attached with the acceptance of the application in New York, and the court held that it was a New York contract, and the New York notice law was enforced against the company, the court saying "there was nothing to the "contrary in the case of the same company vs. Clements, "140 U. S., 226, so much relied on by the defendant."

In Liverpool Steam Company vs. Phoenix Insurance Company, 129 U. S., 397, the decisions as to the situs of contracts are exhaustively reviewed and the court said (page 447):

"The general rule as to what law should prevail, in "case of a conflict of laws concerning a private contract, "was concisely and exactly stated before the declaration "of independence by Lord Mansfield (as reported by Sir "William Blackstone, who had been of counsel in the "case) as follows: 'The general rule, established *ex com-*"*itate et jure gentium*, is that the place where the contract "is made and not where the action is brought, is to be "considered in expounding and enforcing the contract. "But this rule admits of an exception, when the *parties* "(at the time of making the contract) had a view to a "different kingdom. Robinson vs. Bland, 1 W. Bl., 234, "256, 258; S. C., 2 Burr, 1077, 1078.'"

The English cases were reviewed and the general rule as summed up by the Court of Appeal in England is given as follows:

"The broad rule is that the law of a country where a "contract is made, presumably governs the nature, the "obligation and the interpretation of it, unless the con-"trary appears to be the *express intention* of the parties." 12 Q. B. D., 556, 597, 600. And continued:

"This court has not heretofore had occasion to con-"sider by what law contracts like those now before us

"should be expounded. But it has often affirmed and "acted on the general rule, that contracts are to be gov- "erned, as to their nature, their validity and their inter- "pretation, by the law of the place where they were made, "unless the *contracting parties* clearly appear to have "some other law in view."

In Coglan vs. S. Carolina R'd Co., 142 U. S., the court reaffirmed this principle of universal law in emphatic terms, saying (p. 109):

" All the terms of the contract must be examined, in "connection with the attendant circumstances, to ascer- "tain what law was in the view of the parties when the "contract was executed. For, as said by Chief Justice "Marshall in Wayman vs. Southard, 10 Wheat., 1, 48, it "is a principle, universally recognized, that 'in every " 'forum a contract is governed by the law with a view to " 'which it was made.' And by Lord Mansfield in Rob- "inson vs. Bland, 2 Burrow, 1077, 1078: 'The parties " 'had a view to the law of England. The law of the " 'place can never be the rule when the transaction is " 'entered into with an express view to the law of another " 'country as the rule by which it is to be governed. " 'Now here the payment is to be in England; it is an " 'English security, and so intended by the parties.' "Referring to these and many other causes, this court, "speaking by Mr. Justice Matthews, held, upon full con- "sideration, in Pritchard vs. Norton, 106 U. S., 124, "136, that the law upon which the nature, interpretation "and validity of a contract depended, was that which the "parties, either expressly or presumptively, incorporated "into it as constituting its obligation. This doctrine was "reaffirmed in Liverpool, etc. Steam Co. vs. Phœnix "Ins. Co., 129 U. S., 397, 458, where it was said that, "according to the great preponderance, if not the uniform "concurrence of authority, the general rule was, 'that the " 'nature, the obligation and the interpretation of a con- " 'tract are to be governed by the law of the place where " 'it is made, unless the parties at the time of making it " 'have some other law in view.' The elaborate and "careful review of the adjudged cases, American and

"English, in the two cases last cited, leaves nothing to be "said upon the general subject."

III.

This principle of universal law, that the applicatory law of an inter-state contract is that with reference to which the parties have contracted, has been uniformly adopted and enforced by the Federal Courts and the courts of the different States against life insurance companies doing business therein, construing the provisions of the statutory law of the State of incorporation as entering into the policy contracts of the parties.

This has been notably illustrated by the decisions involving the so-called notice law of New York, which has been considered by this court in a recent case, Mutual Life Ins. Co. vs. Phinney. This statute, it will be remembered, required notice from the company to the insured before a forfeiture could be made for non payment of premium, this statute being applicable by its terms to life insurance companies, "doing business in New York."

In several cases, the United States Court of Appeals for the Ninth Circuit, has held that policies issued by New York companies in the States in that circuit were New York contracts, and the New York notice law was applied, because the parties were held to have contracted with reference to the New York law, this ruling being made, even where there was no express agreement upon the New York law, as in the case at bar.

Equitable Life Assurance Soc. vs. Nixon, *supra*.

Equitable Life Assurance Soc. vs. Trimble, 27 C. C. A., 404.

Mutual Life Ins. Co. vs. Phinney, *supra*, now pending in this court.

And again in a very recent case, the same court, in Mutual Life Insurance Co. vs. Hill, 97 Fed. Rep., 263, reaffirmed its ruling, saying:

"It is contended by the plaintiff in error that the "court erred in holding that the contract is to be governed "by the statute of the State of New York. This question "is not a new one in this court. It has been often before "presented, discussed, construed and decided (Society "vs. Nixon, 26 C. C. A., 620, 81 Fed. Rep., 796; same "vs. Trimble, 27 C. C. A., 404) after due deliberation "upon the facts and careful examination of the authori- "ties, this court arrived at the conclusion that the contract "there in question which in so far as legal principles are "involved, cannot be distinguished from the facts in this "case, and was a New York contract." Citing in support thereof Wayman vs. Southard, 10 Wheat., 48; Pritchard vs. Norton, 126 U. S., 131–141; Bank vs. Hume, 128 U. S., 206; Coglan vs. Railroad Co., 142 U. S., 101–109; Hall vs. Cordenn, 142 U. S., 116 and 120.

The court held, further, that this provision of the New York law, thus entering into the contract, could not be waived by the parties, and said:

"Entertaining no doubt of the correctness of the con- "clusions therein reached, we respectfully decline to "further discuss the same identical questions. It is enough "to say that we adhere to the view there expressed."

It was held, further, that it was not necessary for the plaintiff to set up the New York statute, as the United States courts took judicial notice of all public statutes of the States.

In the case of New York Life Ins. Co. vs. Dingley, in the same court, 35 C. C. A., 245, the policy, similar to one here in suit, was assumed to be a New York contract, and the notice law of New York was construed and applied.

Also in the Sixth Circuit, in the case of McConnell vs. Provident Savings Life Association, 34 C. C. A., 663,

it was assumed that the policy was a New York contract and governed by the law of New York.

The same statute was construed and applied to a policy, as a New York contract, by the same court in Rosenplanter vs. Provident Savings Life Association, 37 C. C. A., 566. This was a bill in equity to correct the date in a life insurance policy, on the ground of an alleged mutual mistake, for the purpose of invalidating the notice given under the New York law. The court, in its opinion by Taft, J., construed and applied the New York law, saying, "under the law of New York, by which "this policy, in accordance with its terms, was con- "strued," complainant failed to make out his case.

In Hathaway vs. Mutual Life Ins. Co., in the Circuit Court for the District of Washington, 99 Fed. Rep., 534, in a decision rendered January 2, 1900, the court, following above cases and distinguishing Rosenplanter vs. Insurance Co., *supra*, applied and enforced the notice law of New York, and said:

"The contract is a New York contract to be per- "formed in the State of New York, and as to all rights "and liabilities of the parties, the law of the State of New "York must govern."

The State courts have, without exception, made the same ruling. Thus, the Supreme Court of California, in Griffith vs. N. Y. Life Ins. Co., 101 Cal., 607, and in Harrington vs Insurance Co., 58 Pac. Rep., 180, where the court says the insurance company is located in the State of New York, and it is agreed that the policy is a contract which was to be performed in that State, and then proceeds to consider and apply the New York statute. Also in Osborne vs. Home Life Ins. Co., 123 Cal., 610, where the opinion assumes the New York law to apply, and follows the construction given by the New York courts to the New York statute.

In Washington, in the case of Trimble vs. Insurance Co., 20 Wash., 386.

In Minnesota, in the case of Banholzer vs. N. Y. Life Ins. Co., 74 Minn, 387, where plaintiff also claimed under the notice law of New York, the opinion of the court by Mitchell, J., construed the policy as a New York contract, saying with reference to the same form of policy as that involved in this case: "The parties mutu-"ally agree that this shall be deemed a New York con-"tract according to the laws of that State. The decisions "of the highest courts of that State as to the construction "of such contracts, and of the statutes of New York "must, therefore, be accepted as conclusive upon the "parties," The court, then, considers the New York decisions, and holds plaintiff's contention thereunder untenable.

In Tennessee, in Nall vs. Insurance Co., 54 S. W. R., 109, where the court said: "We think there is no "doubt that the New York statute, being in force at the "time the policy was issued, became part of the contract "and governed its provisions."

Also in Illinois, in Equitable Life Assurance Soc. vs. Trombold, 75 Ills. App., 43, where there was no express agreement as to the New York law, as in the case at bar, the policy was held to be controlled by the New York statute, and the New York notice law was enforced against the company, the court saying that there was evidence tending to show that the parties contracted with reference to the law of New York.

Also in Texas, where the Supreme Court, in Mullen vs. Insurance Co., 89 Texas. 261, said: "We think the "provisions of the New York statute, under the facts "shown in this case, entered into and became a part of "the contract between the parties."

The Court of Civil Appeals, in the same State, applied and enforced the New York statute against this

plaintiff in error, in Smith vs. New York Life Ins. Co., 41 S. W. Rep., 680.

In Iowa, April 8, 1899, in case of Johnson vs. this plaintiff in error, 78 N. W. Rep., 905, in a suit on a defaulted life policy containing the *same stipulation* for the New York law as the one at bar, and claimed to have been kept in force by the New York notice law, the court construed and applied the New York law, saying:

"The defendant company was duly incorporated "under the laws of the State of New York, and the policy "was issued in that State, and by the terms of the appli- "cation the contract was to be construed by the laws "thereof. It was, *therefore*, a New York contract." Citing Wayman vs. Southard, 10 Wheat., 48, and Bank vs. Hume, 128 U. S., 195.

In a few of the above cases the plaintiffs failed in their contention, but in *all* of them—and we find no rulings to the contrary—the policies were held to be New York contracts because the parties were held to have contracted with reference to the laws of New York, and the New York notice law was construed and applied against the company.

The same principle has been applied in all cases, both in the State and Federal courts, where the statutory law of the State of incorporation or the charter of the company has been invoked by plaintiffs in suits against life insurance companies, and that on the theory that the parties have either expressly or impliedly contracted with reference to such law.

Thus in Maryland, in Insurance Co. vs. Ficklin, 74 Md.. 172, where suit was brought on policy issued by a Pennsylvania company to a resident of Virginia, the plaintiff invoked and the court applied and enforced the provisions of the Pennsylvania law against the company, saying:

"Everywhere, within and without the State which

"created it, its contracts are limited, construed and sus-"tained in accordance with the laws that affect its opera-"tion."

In Texas, in a very recent case—Seiders vs. Merchants' Life Ins. Ass'n, 54 S. W. Rep., 753—the Supreme Court of that State, reversing the Court of Civil Appeals, which held that the Missouri law did not apply to contracts delivered in Texas (51 S. W. Rep., p. 547), in a suit against a Missouri life insurance company doing business in Texas, held that the provisions of the Missouri law declaring that representations should not be deemed warranties unless material to the risk, entered into the contract and was the law governing the same, saying:

"Unless there be something in the circumstances "which indicated that the parties contracted with refer-"ence to the law of Texas, the legal effect of the contract "must be determined according to the laws of the State "of Missouri."

The opinion in this case is notable as applying the analogy of interstate contracts with reference to the usury laws of different States, which will be hereafter considered, holding that the same principle applied to interstate insurance contracts.

The same principle was applied by the Court of Appeals of the Second Circuit, in American Credit Indemnity Co. vs. Carrolton Co., 36 C. C. A., 671. This was a suit on a policy of indemnity against business losses issued by a New York company, on an application made in Kentucky. In the latter State there is a statute making warranties in all insurance policies mere representations, and in a suit upon the policy in New York this statute was sought to be applied. But the court held that the policy was a New York contract and that the Kentucky statute did not apply, for the same reason that the Supreme Court of Texas held that the Missouri statute did apply, the court saying in its opinion:

"This statute seems to have been held by the Ken-"tucky Court of Appeals to relate to statements in an "application, irrespective of the fact that it had been "agreed by the parties that they were warranties. The "application in this case was made in Kentucky, and was, "when made and signed, simply a proposition for a bond "of indemnity or policy of insurance. It was sent to New "York, the proposition was accepted, and a contract of "indemnity was thereupon made and executed in New "York, and was presumably returned to the other con-"tracting parties in Kentucky. No fact is disclosed "which tends to show that the place of performance was "to be in Kentucky. We see no reason why the provis-"ions of a statute of Kentucky should be imported into a "contract known by both parties to be made in New York, "and so far as payment by defendant is concerned to be "performed in St. Louis or New York. It was when made, "a *commercial instrument*, and is to be construed in "accordance with the principles of *commercial law*, unless "there are statutes of the State of New York which con-"trol its construction." Citing: Hyde vs. Goodnow, 3 N. Y., 266; Western vs. Ins. Co., 12 N. Y., 258; Scudder vs. Bank, 91 U. S., 406.

It should be observed that in all of these States where the Federal and State courts have thus united in holding that the policies of the companies doing business therein are controlled by their respective charters, there are insurance departments regulating the business of life insurance, whereunder licenses are granted to foreign companies, substantially the same in general statutory regulation, as that in force in the State of Missouri. See Revised Statutes of Texas of 1895, Title LVIII, Chapter 2; Code of State of Washington, 1895, Chapter 188; Code of Tennessee, 1884, Sections 2517 to 2584; California Political Code, 1897, Sec. 564; Minnesota, 1 General Statutes, 1891, Sec. 2920.

Thus we have this anomalous situation, for which we submit there is no precedent in our jurisprudence. An interstate life insurance contract made by a company

incorporated under one State with a citizen of another State where it is doing business, is subject to *two* applicatory laws, that of its Home Office and that of the residence of its policy-holder, the applicatory law to be selected at the *option* of the policy-holder as it suits his convenience and the purposes of the litigation.

When a policy-holder makes default on his policy, he thus has the option of considering whether it is better for him to declare his policy a Missouri contract and invoke the Missouri non-forfeiture law, on the ground declared by the Missouri court in this suit, that the statute *ex proprio vigore* makes the contract a Missouri contract, because the company does business in the State; or, *at his option*, if he concludes that there has been some defect in the service of notice under the New York law, he can declare that the contract is a New York contract because the company and himself contracted with reference to that law, thus invoking the principles of universal law, and according to the doctrine of all cases in Federal and State courts cited above, he can recover on that ground!

We have an interesting illustration of this anomalous situation in the recent case of Linn against this same plaintiff in error, 78 Mo. App., 192, decided by the Court of Appeals of Missouri. There the plaintiff did this very thing, claiming to find that there was some defect in the service of notice of forfeiture, she pleaded the New York statute as a part of the contract, and the court applied and construed it, following the decisions of the New York courts as to the construction of the statute, by holding that plaintiff had failed to make a case thereunder!

In the case of the very policy here in suit, if the defendant in error had claimed the policy to be a New York contract and the company had failed to prove that the notice required by the New York law had been served, according to the cases above cited she could have recovered on that theory.

Rorer says, Interstate Law (2nd Ed.), pp. 110, 111:

"When parties contract with reference to the laws of "a particular State, it is proper that those laws should "govern their contract, in whatever form the contract is "construed or litigated upon. Those laws form an "integral part of their contract, and as a general rule, to "hold otherwise, would be a breach of State comity, and "the precursor of *much confusion*."

We quote again from Wharton (Conflict of Laws, 2nd Ed., Sec. 427):

"But as to the applicatory local law, according to "Savigny, the *plaintiff has no election*. There are no "two such statutes between which he may choose. It "would be a *gross injustice* to the defendant, as well as a "*great discredit* to the law itself, argues this great jurist, "if such an election were allowed. Each case has, in "right, its own particular law which attached to it when "it arose, by the assent of the parties, which law con- "tinues always to envelop it; and such law must be "applied, as a general rule, by every court to which the "plaintiff may appeal."

IV.

Parties to an interstate contract may contract in good faith for the law of the State of either and the law thus agreed upon will be enforced in the other State as the law of the contract, although the domestic law of such State, which but for such agreement would have been the law of the contract, may be incapable of waiver. This is clearly illustrated in the case of usury laws in interstate contracts.

The failure to apprehend the distinction between the contracting in good faith for the foreign law, and the *waiver* of a domestic law, is the fallacy which underlies defendant in error's entire contention.

This position, as we understand it, is that such an agreement for a foreign law in an insurance contract,

whether made in good faith or not, and in accord with the nature of the contract itself, is necessarily invalid, as an attempt to evade the laws of the State, and that the Missouri statute applies, although it clearly appears that the parties would not have contracted under that statute, and that its obligation and enforcement are at variance with the principle of mutuality which inhere in the very basis of the contract itself.

The fallacy of the position is the failure to apprehend the very obvious distinction between an attempt to waive a statute by those who are subject to it, and an agreement by parties who are severally subject to separate sovereignities, contracting in good faith with reference to the laws of one of them.

The distinction cannot be better illustrated than in the matter of *usury* laws. These are enacted from considerations of public policy as ancient as our civilization, and obviously cannot be waived by any private agreement, yet it is Horn Book law, that citizens of different States, in a promissory note, or other contracts, may agree upon the rate of interest permitted by either, and the agreement will be enforced *ex comitate*, though the rate thereby agreed upon is in violation of the laws of the country where it is sought to be enforced. All that is required is that the agreement shall be made in good faith, and not as a mere cover of an attempt to avoid the usury laws of the State where the contract is made.

Freeland vs. Hern, 7 Cranch, 147.

Andrews vs. Pond, 13 Peters, 65.

Miller vs. Tiffany, 1 Wallace, 298.

Johnson Bank vs. Bank of Ashland, 12 Wallace, 266.

Story on Conflict of Laws, Sections 304 A & B.

In Andrews vs Pond, Taney, C. J., said:

"The general principle in relation to contracts made "in one place to be performed in another is well settled. "They are to be governed by the law of the place of per- "formance, and if the interest allowed by the law of the "place of performance is higher than that permitted at "the place of contract, the parties may stipulate for the "higher interest without incurring the penalties of usury."

This fundamental doctrine of private international law is thus stated by the Supreme Court of Illinois, McAllister vs. Smith, 17 Ills., 328, 65 Am. Decisions, 651:

"The contracts were made in this State and the laws "of this State would, had the parties been silent, have "become part of the contract for the contraction and "meaning of the parties in ascertaining and fixing their "mutual rights and obligations. But parties may substi- "tute the laws of another State and country than that "where the contract was entered into, both in relation to "the legality and extent of the obligation, and in relation "to the respective rights of the parties, for a breach or "violation of its terms."

See 2 Kent's Com., 13th Ed., p. 459.

In Smith vs. Parsons, 55 Minn., 520, the court, in determining whether the law of Connecticut or Minnesota applied on question of usury, said, p. 520:

"It is in accord with the weight of authority and with "principle, that where two parties make a contract of "loan in one State to be performed in another, they *may*, "*acting in good faith, and without intent to evade the laws* "*agree that the law of either State shall control as to the* "*rate of interest*. 2 Kent Com., (12th Ed.) 460; Robin- "son vs. Bland, 2 Burrows, 1077; Miller vs. Tiffany, 1 "Wall, 298."

The court says that it is often a matter of great nicety to determine the applicatory law, and parties should therefore determine that for themselves, and this makes

it unnecessary for the court to determine by the law of which State it would have to be decided, had they not so agreed.

Smith v. Muncie National Bank, 29 Ind. 158, was an action upon a bill of exchange drawn in Muncie, Ind., upon the appellant in Cincinnati, Ohio, payable in that place, and accepted by him. The appellant answered, among other things, that the appellant accepted the bill of exchange for the accommodation of the drawers and the first endorser thereof, and that said bill was usurious under the laws of Indiana, and was made payable in Ohio "to evade the statute of Indiana, and to defraud said defendant." To this a demurrer was sustained. The court said:

"Does, then, the averment, that for the purpose of "evading" or escaping from the force of the usury laws "of this State, and the securing of a higher rate of interest under the laws of another State, the bill was made "payable in the latter State, amount to an allegation that "the bill was usurious? We think not. This averment "does not deny that it was the intention of the parties that "the contract should be executed in Ohio, in good faith, "and we do not see why the laws of a sister State may "not be taken advantage of by citizens of our own State, "when, with whatever motive, they elect to make that "State the place for the performance of any contract into "which they may enter. It has been held that for the "purpose of giving a special court jurisdiction of a cause, "a party may change his residence, and we see no reason "why, in order to avail himself of the laws of a particular "locality, he may not select the place of the performance "of a contract; of course, the purpose must be to require "the discharge of the contract at that locality."

In Hubbell vs. Morristown Land and Imp. Co. (Tenn.) 11 Pickle 585, the note was executed by a Tennessee company in North Carolina where its president resided, but was made payable in New Jersey, where plaintiff resided, but was delivered in Connecticut, where

he was visiting. Held, in absence of evidence that parties contracted with reference to laws of either of the other States, the laws of place of payment, New Jersey, was the applicatory law, and note was therefore usurious.

The principle is, of course, subject to the qualification that the contract does not involve a *malum in se*, or be founded on moral turpitude; but the fact that there is a *difference* in the law in the two sovereignties, merely presents a case of *conflict of law*, and the intent of the parties must be clearly expressed or implied in selecting the applicatory law. If there was no difference in the law, there would be no occasion for the rules of private international law, or for what Dicey calls the "choice of law." (Conflict of Laws, p. 472,*et seq*).

It necessarily follows, therefore, that the assertion on which plaintiff's entire position is based, that the agreement of the parties in the case for the New York law, was necessarily invalid as an attempt to *evade* the Missouri law, ignores this principle of private international law. A cannot contract with B to *waive* the usury laws of Missouri, but A in Missouri can contract with B in Denver for the rate of interest permitted either by the Colorado or Missouri law.

The law as stated by Mr. Parsons is as follows:

"If a note be made *bona fide*, in one place, expressly "bearing an interest legal there, and payable in another "place, in which so high a rate of interest is not allowed, "it may be sued in the place where payable, and the inter-"est expressed recovered. Because the parties had their "election to make the interest payable according to the "law of either place; or to express the same thing differ-"ently, they may lawfully agree upon the highest interest "allowed by the laws of either place, or any less interest." 2 Parsons on Contracts, page 95.

In U. S. Savings and Loan Association vs. Shain, 77 N. W. R., 1006, 1898, the Supreme Court of North Dakota in a very recent case, says:

"Parties were residents of different States. It was "entirely competent for them, then, to contract under the "laws of either. They expressly agree both in the note "and mortgage that they contracted under the laws of "Minnesota, the State of which appellant is a resident. "That agreement is binding."

In a recent case in the Circuit Court of Appeals for the Ninth Circuit, Dygert vs. Loan and Trust Co., 37 C. C., A. 389, the court holds, quoting from the opinion in Andrews vs. Pond, *supra*, that plaintiff was not required to allege in his petition to recover on a note which was made payable in a different State, that it was so made for convenience and in good faith, and not to evade usury laws.

This principle was recognized by the Supreme Court of Missouri in Bank of Louisville vs. Young, 37 Mo., 407. In Phœnix Mutual Life Insurance Company vs. Simons, 52 Mo. App., 357, a contract made by a married woman, who was then in Missouri under common law disability, with a foreign corporation, was enforced because the court held that the contract was made with reference to the Kansas law, where she was competent to contract: and thus a married woman in the courts of Missouri was compelled to pay a note bearing twelve per cent. interest, because such note and such interest were valid under the laws of Kansas. This note was held to be a Kansas contract because, although signed at Nevada in Missouri, it was delivered to plaintiff's agent at Fort Scott in Kansas, who made the loan, the soliciting agent in Missouri being held to be a mere middle man through whom the parties negotiated.

There is no pretense in this case that the New York law, for which the parties contracted, is against good morals or religion, or that the contract is founded upon moral turpitude which, under the recognized limitations of the law of comity, would prevent the courts of this State

from enforcing it. The only claim is that the law of Missouri is *different* from the law of New York; but this as already seen, is the case, wherever it is necessary to apply the rules of private international law.

The very recent case decided by the Supreme Court of Texas of Seiders vs. Merchants Life Association, *supra*, is strikingly illustrative of the analogy of usury laws in interstate contracts to interstate insurance contracts. A Missouri life insurance company doing business in Texas being sued upon a policy, set up the alleged falsity of statements in the application, to which plaintiff replied setting up the provisions of the Missouri statute, that misrepresentations should not be material, unless actually contributing to the loss. The policy was payable at the Home Office of the company and all premiums paid there, although there was no express agreement upon the Missouri law, and there was a statute in Texas providing that insurance companies as a condition of doing business shall appoint an office and have an agent in Texas, and there were other provisions in the Texas statutes regulating the business of insurance. But the Supreme Court, reversing the Court of Appeals, held that the contract was nevertheless a Missouri contract, applying the analogy of cases involving the usury laws above cited, and said: "Unless there can be something in the "circumstances which indicate that the parties contracted "with reference to the laws of Texas, the legal effect of "the contract must be determined according to the laws "of the State of Missouri," citing Story on Constitutional Law, 280 Note a; Andrews vs. Pond, 13 Pet., 65; Railroad Co. vs. Bank, 12 Wal. 226; Lewis vs. Hedley, 36 Ill., 433; Bank vs. Hall, 150 Pa., 4661; Ryan vs. Railroad Co., 65 Texas, 13.

It is the failure to make this distinction between the contracting in good faith for a foreign law and the attempted waiver of a domestic law enacted from consid-

erations of public policy which has misled the Supreme Court of Missouri in its citation of the decision of this court in Insurance Co. vs. Clements, *supra*, as authority for the decision in this case. In the Clements case, the contract was held upon the facts under the rules of private international law, to be a Missouri contract. Being a Missouri contract, the Missouri law entered into it, as the parties were conclusively presumed to have contracted with reference to it; and as the law was enacted from considerations of public policy, it was held to be incapable of waiver by the parties.

But the case at bar is not the attempted waiver of a domestic law, but the agreement in good faith upon the applicatory law of an interstate contract, being the law of the State of the Home Office of the company, with reference to which all of the engagements of the company were made.

V.

Qualifications, to which the choice of applicatory law of contract is subject.

This principle of universal law whereunder parties to an interstate contract involving a choice of laws may select the applicatory law, is subject to two qualifications:

(*a*) That the choice is made in good faith and in furtherance of the purposes of the contract, and not as an evasion of the local law; and

(*b*) That the foreign law agreed upon must not be prejudicial to the interests of the State where sought to be enforced, or violative of its public policy.

These qualifications are obviously inherent in the right of choice of the applicatory law of a contract when a foreign law thus selected is sought to be enforced in the courts of any State. It is now proposed to consider these in their order and to show that under the conceded facts:

First. The selection of the New York law as the applicatory law of the interstate contract of insurance evidenced by the policy in suit, was reasonable and in furtherance of and necessitated by the purposes of the contract, and was in no wise an attempted evasion of the laws of Misssouri.

Second. That this selection of the New York law was necessitated by the nature of the contract and the plan of insurance embodied therein, whereunder the other members of the tontine class acquired interests therein, in consideration of the contingent interests enjoyed by the insured during his life in the policy contract of his associates in the same class.

Third. That as the selection of the New York law was necessary to the contract made by the parties, it follows that even if there had been no express selection of the New York law, the parties would be presumed to have contracted with reference to that law.

Fourth. This selection of the New York law being in furtherance of and necessitated by the contract, was in no wise prejudicial to the interests of the State of Missouri, or violative of its public policy. Considering these in their order:

VI.

The selection of the law of New York as the applicatory law of the interstate contract evidenced by the policy in suit, was reasonable and in furtherance of and indeed necessitated by the purposes of the contract, and was in no wise an attempted evasion of the laws of Missouri.

The agreement must be made in good faith and in furtherance of the purposes of the contract. Thus in the case of usury laws, while the parties to an interstate contract may contract with reference to the laws of either State, it is clear that they cannot contract for the law of

any other State than one of the jurisdictions to which they are severally subject, or with reference to which the contract is made. In the case at bar, the very nature of the engagement rendered the selection of the New York law as the applicatory law of the contract essential to the purposes of the contract.

"The law defining the insurance engagements is that "of the place where the corporation issuing the policy has "its seat; and where the loss, if it be incurred, is to be "paid. When the policy is procured by correspondence, "or through the action of an agent, this rule obtains, in "all cases in which the agent has no power to conclude "the insurance, but refers the matter to the principal for "decision."

Wharton on Conflict of Laws, Sec. 465, 2d. Ed.

Defendant is a *mutual* life insurance company. It has no capital stock. Its policy-holders reside not only in the different States and Territories of this country, but in foreign countries, It is agreed, and, indeed, the court will take judicial notice of the fact, without any proof, that such a company essentially consists of the administration of a trust fund, made by its current and accumulated premiums paid in for the exclusive benefit of its policy-holders paying the premiums, less the expenses of administration. The members constitute a society, and each member is at once insurer and insured, entitled to participate in the management and share in the profits in proportion to his interest. See 2 May on Insurance, 2d Ed., Sec. 568.

The essential feature of the administration of such a fund is *equality* between the beneficiaries; and discrimination between them, *i. e.*, between the different policy holders of the same class, is fatal to the principle of mutuality.

As the policy-holders, the sole beneficiaries of this trust fund, which is based on the scientific averaging of

the expectancy of human life, reside in different States, the necessity for a uniform law for the administration of the trust inheres in its very nature. Such uniform law is demanded precisely as in the case of the administration of the Peabody trust fund, or of any other private trust. It is eminently proper, therefore, and in furtherance of the beneficent purposes of the trust, that the scattered beneficiaries, residents in different States, should contract for, and with reference to, a *uniform law* for the administration of the trust. The right of the beneficiary in Missouri in the administration of this trust must be determined by the same law as those of his fellow-beneficiaries, resident in other States and countries.

The only uniform law, which could be applied, is that of the seat of the trust itself, the chartered domicile of the trustee.

The trustee may be subjected to individual actions in different sovereignties where it does business, but the law of the domicile of the corporation is necessarily the law of the trust and the only law whereunder that trust can be administered and liquidated. In the language of this court in Relfe vs. Rundle, 103 U. S., 226, "Every person "who deals with it everywhere is bound to take notice of "the provisions which have been made in its charter for "the management and control of its affairs, both in life "and after dissolution." See also Smith vs. Mutual Life Ins. Co., 14 Allen, 336.

The essential nature of life insurance, and a *fortiori*, that of *mutual* life insurance, is clearly shown by Bradley, J., in the opinion of the Supreme Court in N. Y. Life Ins. Co. vs. Statham, 93 U. S., 31:

"The insured parties are *associates in a great scheme*. "This associate relation exists, whether the company be "a mutual one or not. Each is interested in the engage- "ments of all, for out of the co-existence of many risks "arises the law of average, which underlies the whole "business. An essential feature of this scheme is the

"mathematical calculation referred to, on which the pre-"miums and amounts insured are based. And these cal-"culations again are based on the *assumption of average* "*mortality*, and of prompt payments, and of compound "interest thereon."

The stipulation for a uniform applicatory law for the administration of this mutual trust fund, was not only reasonable, but necessitated by the very nature of the trust created by these contracts. Clearly the insured in this policy would have been held entitled to all the benefits secured to him under the New York law under his contract of membership, and, as already seen, the existence of an *option* in the insured to select the applicatory law of the contract is wholly anomalous and inadmissable.

VII.

The selection of the New York law as the applicatory law of the contract was necessitated by the nature of the contract and emphasized by the plan of insurance embodied therein, whereunder the other members of the tontine class acquired interests therein in consideration of the contingent interest enjoyed by the insured during his life in the policy contracts of his associates in the same class, and defendant in error as his representative, is therefore now estopped from asserting any other or different claim from that fixed under the law thus selected.

The application of this tontine principle to life insurance extends and emphasizes the *mutuality* incident to all life insurance. It is a known and judicially recognized system, being defined in the Century Dictionary (under head "Tontine") as follows:

"A policy of insurance, in which the policy-holder "agrees in common with the other policy-holders under "the same plan that no dividend, return premiums, or sur-"render value shall be paid for a term of years, called "the tontine period, the entire surplus from all sources

"being allowed to accumulate to the end of that period, "and then divided among all who have maintained their "insurance in force. This modification of ordinary life "insurance has been adopted, as optional with the insured, "for the purpose of countervailing the tendency to burden "long-lived and persistent policy-holders with a large "amount of premiums in comparison with those whose "lives fall in shortly after obtaining insurance."

The New York Court of Appeals in case of Bogardus vs. Ins. Co., 101 N. Y., 329, speaking of the tontine plan of life insurance, says:

"It contemplates the *union of the interests of a large "number of persons and the administration of a fund*, for "their mutual benefit, and from its very nature, is incapa- "ble of being molded and managed to meet the special "requirements of particular individuals. * * * '*Upon* " '*the accession of any person to this class he becomes inter-* " '*ested in the contributions of every other member, and* " '*neither of them can afterwards withdraw his contribu-* " '*tion without injury to the rights of all others interested* " '*in the fund.*' "

It is too clear for argument, that the very conception of this plan of insurance involves and necessitates a *uniform law* for the administration of this tontine fund, to which the survivors of the class are entitled, and in which each policy-holder of the class has an interest, contingent upon survivorship. The insured, and defendant in error, acting through him, deliberately selected this form of insurance, and asked admission into this class. The non-forfeiture feature set out in this policy was an essential part of this plan of insurance; and special notice was given, that unless it was agreed to, *the policy would not be issued*. As shown by the agreed statement (Sec. 14), the total number of members of the same tontine class was 5172, with policies aggregating $20,154,981. The insured and defendant in error enjoyed the benefits of this class, permitting during that year others to enter on faith of

this and similar contracts, holding the contingent right of survivorship, and defendant in error claims the right to repudiate this engagement, and to deprive her fellow-beneficiaries of a portion of the trust fund which is held for their benefit. Although the relation between plaintiff and defendant is primarily one of contract, it is nevertheless true that the defendant company is in reality only a trustee in such a contest as this, asserting, as it is bound to do, the integrity of the trust, which it is administering. The claim asserted by plaintiff is in effect against surviving members of the tontine class, her fellow beneficiaries; whatever she recovers over the amount tendered, fixed by the contract, is recovered from *them*, in violation of her agreement, whereon they have relied in making their payments.

It is unnecessary to do more than invoke the elementary principle of *estoppel*, resting on inherent justice, to show that such a claim as that now asserted cannot be sustained. The doctrine of estoppel has been frequently applied against insurance companies in favor of policy claimants—here it is invoked in favor of policy-holders, members of a specific class, for protection against impairment of a fund, created by their own and the insured's solemn engagement.

VIII.

As the selection of the New York law was necessary to the contract made by the parties—that is, to the tontine plan of insurance duly selected and adopted—it follows that even if there had been no express reference to the New York law, the parties would be presumed to have contracted with reference to that law.

In the language of Phillimore, adopted by this court in Pritchard vs. Norton, *supra*, it is the *will* of the contracting parties, and not the law, which determines the

place of the jurisdiction to which the parties select to submit themselves. In the case at bar, there is an *express* reference to the law with reference to which the parties contract, and it is unnecessary, therefore, to consider what the law would *presume* as to their intent.

But if there had been no express reference to the New York law, the fact that this law is essential to the tontine plan of insurance selected and adopted by the parties, would be conclusive that this was the law with reference to which the parties contracted. It is the fundamental principle of private international law that when there are two conflicting laws, that law will be adopted by which the validity of a contract, as the parties have made it, is best sustained. This court says, in Pritchard vs. Norton, 106 U. S., 124, in the language of Phillimore:

"As all the foregoing rules rest upon the presumption "that the obligor has voluntarily submitted himself to a "particular local law, that presumption may be rebutted, "either by express declaration to the contrary, or by the "fact that the obligation is illegal by that particular law, "though legal by another. The parties cannot be pre- "sumed to have contemplated a law which would defeat "their engagements."

And the court adds:

"This rule, if universally applicable, which perhaps "it is not, though founded on the maxim, *et res magis "valeat, quam pereat*, would be decisive of the present "controversy, as conclusive of the question of the appli- "cation of the law of Louisiana, by which alone the "undertaking of the obligor can be upheld."

"At all events, it is a circumstance, highly persua- "sive in its character, of the presumed intention of the "parties, and entitled to prevail unless controlled by more "express and positive proofs of a contrary intent."

And Mr. Wharton says, Section 507, Conflict of Laws: "More reasonable is the view maintained by Sav- "igny, and substantially adopted by Mr. Parsons, that

"when there are two conflicting laws bearing on this "point, that law will be adopted by which the validity of "the obligation is best maintained."

Gibson vs. Connecticut Ins. Co., 77 Fed. Rep., 561, was a suit on a fire insurance policy issued on a Minnesota property by a Connecticut company to a citizen of Missouri, and the question was as to the applicatory law. It was held in an able opinion by Judge Phillips that the parties must be held to have contracted with reference to the Minnesota law, because that was essential to the purposes of the contract, quoting from Chitty, J., *in re* Missouri S. S. Co., 42 Ch., Div. 329, as follows:

"The circumstances that the stipulations, which the "client asks to have struck out of the contract, are "allowed by the law of one country and disallowed by the "law of another, affords a cogent reason for holding that "the parties were contracting with reference to the law "of the country which allowed, and not to the law "which disallowed the stipulation. It is unreasonable to "presume that the parties inserted into the contract stipu-"lations which they intended should be nugatory and "void."

Applying these established principles to the case at bar, the conclusion is inevitable that the parties must have contracted with reference to the New York law, because that was essential to the plan ot insurance which was selected and adopted. The insured could not enjoy the benefits of a mutual insurance company, and a *fortiori* on the tontine plan of insurance, without becoming, in the words of this court, "an associate in a great sheme "whereunder each became interested in the engagements "of all." Ignoring the express stipulation for the New York law, the parties could not be presumed to have selected a law which would defeat their engagement by destroying the mutuality upon which it was based.

IX.

The selection of the New York law as the applicatory law of the contract, being thus in furtherence of and necessitated by the contract, and the plan of insurance embodied therein, was in no wise in violation of the Missouri law or prejudicial to the comity of the State.

It will not be disputed that the agreement for the New York law was made in good faith and in furtherance of and indeed necessitated by the purposes of the contract. No contention to the contrary is made in the opinion of the Missouri court.

But we concede that the principle of universal law which we have invoked is subject to a second qualification, that the foreign law agreed upon must not be injurious to the interests of the State, or, as stated by Story, "the State shall not suffer prejudice by its comity."

The opinion of the Missouri court does not proceed at all upon the theory that the interstate contract of insurance made in this case between the parties was against good morals or public policy, under the recognized qualification of the rule of international law. If this had been the view of the court, the contract could not have been enforced at all, as the court would have declined to enforce a contract made with reference to a foreign law, which was inconsistent with good morals, or otherwise uninforcible under the recognized qualification under the general rule. This is not a case where the court could reject a single stipulation and enforce the contract without it, because the right of temporary insurance which the insured had contracted away to his associates in the great interstate scheme of insurance, was the very basis on which recovery is sought. But the court proceeded upon another theory, that is, that the statute as construed by the court, not only avoided the contract between the

parties, but *ex proprio vigore* made a different contract between them.

It is not contended that the Missouri statute prohibits interstate mutual life insurance contracts, whether on the tontine plan or otherwise. On the contrary, the statute, by permitting foreign life insurance companies to do business in the State with the deposit there of their own charters with the Insurance Department, clearly contemplates that they shall make *interstate contracts* of life insurance according to the known and recognized plan of mutual insurance.

Conceding that the statutes of Missouri disclose the public policy of the State against the forfeiture of life insurance policies, the policy contract in this case harmonizes therewith in the adoption of a uniform non-forfeiture provision for all its policy-holders of the same class, which the insured deliberately applied for and accepted. It was conceded, and the Circuit Court rendered judgment for plaintiff in error on that very ground, that the paid-up value secured by the policy, which plaintiff in error tendered and still tenders, was exactly equal to the paid-up value secured by the Missouri statute, being the full value of the reserve. It is true the policy did not give him the temporary insurance as an alternative for paid-up insurance, but it did give him a contingent interest in the event of *survivorship* in the *surplus* accruing from all the policies of the same class, *to be distributed at the end of the tontine period.*

The argument that the contract was in violation of the public policy of Missouri because it provided a *different* adjustment in case of default, proves too much, because that would make an interstate contract impossible where there was a difference in the laws of two sovereignties. It would make impossible any "*choice* of law." It s *because* there is a difference in the law, that the rules of

private international law are required to determine the situs of contracts.

But since the bringing of this suit, the General Assembly of Missouri has recognized that such contentions as defendant in error is making in this case are fatal to the vital principles of mutual life insurance, and the law here invoked was amended, see Session Acts of 1895, p. 97, R. S. 1899, Sec. ——; so that now parties to interstate contracts of life insurance are in express terms *authorized to select* the non-forfeiture provisions of other States, provided only that not more than three years' payment of premiums are required. In other words the public policy of the State recognizes the right of "choice of law."

An illustration of the established public policy which warrants the court in refusing to enforce a contract for a foreign law, may be found in the contracts of carriers of foreign shipments, wherein it is sought to secure exemption from the negligence of employes, such stipulations for exemption being permitted by foreign law, but are against the public policy of this country and are uninforcible in our courts. In such cases, stipulations for the foreign law have been held not to be agreements in good faith for a foreign law in furtherance of the purposes of the contract, but mere devices to avoid the effect of the American law in a question of controlling public policy, and *for that reason* the courts have declined to enforce such stipulations. See Steamship Co. vs. Insurance Co., 129 U. S. 397; "Bradford City," 29 Fed. Rep., 373

Oscanyan vs. Arms Company, 103 U. S. 261, quoting Story on Conflict of Laws, Sec. 258, is also an illustration of the qualification of the law of comity in the enforcement of a foreign law.

These illustrations, however, demonstrate that this qualification of the law of comity can have no possible application to the case at bar, where it must be conceded

that the choice of the foreign law was made in good faith in furtherance of and necessitated by the contract, and the essential justice of this choice of law and its harmony with the public policy of the State of Missouri had been declared by the General Assembly of the State four years before this decision of the Supreme Court of the State.

The right of choice of law is thus inherent in the right of interstate contract, and the exercise of this right in the case at bar was in furtherance of and necessitated by the contract, and in no wise in violation of the laws or prejudicial to the public policy of the State of Missouri.

It is not disputed that these principles would control if the contract had been made between natural persons. This brings us to the consideration of the only ground upon which the decision of the Missouri court is sought to be sustained, and that is that these principles of universal law are inapplicable to the case at bar because one of the parties to this interstate contract was a foreign corporation doing business, as claimed, in the State *ex gratia* through the comity of the State.

X.

Conceding that plaintiff in error, as a life insurance company of New York, was doing business in Missouri through the comity of the State, this did not disable the parties to this interstate contract from contracting in good faith under the foregoing rules of universal law in furtherance of the purposes of their contract, as to the applicatory law thereof.—This admission by comity did not make plaintiff in error a domestic corporation, and its contracts with the citizens of Missouri are interstate contracts governed by the foregoing rule sof universal law.

It is assumed in discussing this phase of the case that plaintiff in error, a New York corporation, was doing business in Missouri through the comity of the State. It

follows that the State could have excluded it entirely from doing business in the State, or could have admitted it only upon the condition of its becoming reincorporated as a *domestic* corporation. It follows also, as declared by this court, that the absolute power of exclusion includes the right to exact the payment of a license tax for the privilege, or to impose such conditions as it might deem fit, provided, in the words of this court in Insurance Co. vs. French, 18 Howard, 407:

"Such conditions are not repugnant to the constitution "or laws of the United States, or inconsistent with those "rules of public law which secure the jurisdiction and "authority of each State from encroachments by all others, "or that principle of natural justice which forbids con- "demnation without opportunity for defense."

But assuming that the State of Missouri did have the power to exclude foreign life insurance companies, or to require them to reincorporate as domestic corporations, it did not see fit to do so. It did authorize their admission as foreign corporations, requiring them to deposit their charters from their own States with the Insurance Department of the State, and also accepts evidence of deposits of securities for their policy-holders with the insurance department of the State of their incorporation. They are admitted, therefore, as *foreign* corporations and do business as such, and their contracts made through their Missouri offices with citizens of Missouri are *interstate contracts*, between subjects of different sovereignties, and are governed by the rules of universal law applicable to such contracts.

Assuming, therefore, that foreign life insurance companies are not citizens within the meaning of Article IV, Section 2, of the Federal Constitution, yet they are persons included in the Fourteenth Amendment, and when admitted into a State, through comity, to do business therein, they are *persons* within its jurisdiction, entitled to

the equal protection of the laws, and are protected by the constitutional guarantee against being deprived of life, liberty or property without due process of law.

Santa Clara County vs. So. Pac. R. R. Co., 118 U. S., 396.

Pembina Mining Co. vs. Pennsylvania, 125 U. S., 181.

Railroad Co. vs. Gibbs, 142 U. S., 386, 391.

Railroad Co. vs. Ellis, 165 U. S., 150, 154.

Smith vs. Ames, 169 U. S., 466, 522.

In Blake vs. McClung, 172 U. S., 239, it was held that a business corporation which had not been admitted to do business in Tennessee, for that very reason was not within the jurisdiction of that State, within the meaning of the Fourteenth Amendment, and it was *therefore* not entitled to complain of discriminating legislation of that State. *Ergo*, if the corporation had been admitted to do business in the State, it would have been "within its jurisdictton," and protected by the Federal guarantees against discriminating State legislation.

Plaintiff in error, therefore, was admitted into Missouri, through the comity of the State, to do business as a *foreign* corporation. The State of Missouri, under this assumption, could have required its reincorporation as a Missouri company, and then the question presented in this case as between the company and citizens of Missouri could not have been raised, and its contracts with citizens of Missouri would have necessarily been *domestic* contracts. But the State of Missouri did not see fit to take this course, but permitted plaintiff in error, under such conditions as it saw fit to impose, to come into the State and do business as a *foreign* corporation, making contracts *as such* with its citizens. The law upon this subject

was thoroughly construed and fully declared by this court in Canada Southern Ry. Co. vs. Gebhard, 109 U. S., 527, where the authorities as to the situs and powers of foreign corporations doing business in other sovereignties were exhaustively reviewed.

Suit was brought in New York by holders of the mortgage bonds of the Canada Southern Railway Company who had not consented to the refunding of their securities under a composition agreement, which had been effected under act of the Canadian Parliament, defendant being a Canada corporation. There was no constitutional prohibition in Canada of the impairment of the obligation of contracts. It was held that the arrangement act was valid, binding non-assenting bondholders, and should be given the same effect in courts of the United States.

On page 537, the court (Waite, C. J.,) says:

"The corporation must dwell in the place of its crea-
"tion, and cannot migrate to another sovereignty (Bank
"of Augusta vs. Earle, 13 Pet., 588), though it may do
"business in all places where its charter allows, and the
"local laws do not forbid. R. R. Co. vs. Koontz, 104
"U. S., 12. But wherever it goes for business, it carries
"its charter, as that is the law of its existence (Relf vs.
"Rundell, 103 U. S., 226), and the charter is the same
"abroad as it is at home. Whatever disabilities are
"placed upon the corporation at home it retains abroad,
"and whatever legislative control it is subject to at home,
"must be recognized and submitted to by those who deal
"with it elsewhere. A corporation of one country may be
"excluded from business in another country (Paul vs.
"Virginia, 8 Wall., 168), but, *if admitted, it must, in the*
"*absence of legislation equivalent to making it a corpora-*
"*tion of the latter country be taken both by the government*
"*and those who deal with it, as a creature of the laws of*
"*its own country*, and subject to all the legislative control
"and direction that may be properly exercised over it at
"the place of its creation. Such being the law, it follows
"that every person who deals with a foreign corporation,

"subjects himself to such laws of the foreign government, "affecting the powers and obligations of the corporation "with which he voluntarily contracts, as the known and "established policy of that government authorizes; and "to all intents and purposes he submits his contracts with "the corporations to such a policy of the foreign govern- "ment, and whatever is done by that government in fur- "therance of that policy which binds those in like situa- "tion with himself, will necessarily bind him. He is "*conclusively presumed to have contracted with a view of* "*such laws of that government*, because the corporation "must of necessity be controlled by them, and it has no "power to contract with a view to any other laws with "which they are not in entire harmony. It follows, there- "fore, that anything done at the legal home of the corpor- "ation under the authority of such laws, which discharges it from liability there, discharges it everywhere."

The case at bar is far stronger than the one cited. The court will take notice that a mutual life insurance company is simply the administrator of a fund collected from the policy holders in different States and countries for their benefit, and that a uniform law is *essential* to the administration of the fund. It is eminently proper, and indeed, essential, that parties contracting with the administrator of such a fund, should stipulate for such uniform law for the construction of their mutual rights and obligations under their contract.

It necessarily follows, therefore, that the insurance policy contracts of foreign insurance companies, as contracts of other foreign corporations, made by them with the citizens of a State, when doing business in that State through the comity of the State, are like the contracts of natural persons, subject to the limitations of their own charters, and the *situs* of such contracts is to be determined by the fundamental rules of "universal law."

As will be hereafter seen, this status as foreign corporations does not mean that they were not subject to the laws of the State enacted in the full plentitude of the

police power of the State. The State doubtless could limit their contractual power by prohibiting the making of certain contracts. But unless the foreign corporation is reincorporated as a domestic corporation, it remains a foreign corporation, and its contracts with citizens of the State are interstate contracts, subject to the right of choice of law thereof, which is inherent in the law of interstate contracts. It is interesting to note in this connection that while State departments of insurance have been established in nearly all States of the Union, and careful provision is made for State supervision and examination, there has been no attempt to enforce the reincorporation by foreign companies as domestic companies in any State so far as we have been able to ascertain. This is doubtless from a conviction of the essentially mutual and interstate character of life insurance, as illustrated by the Act of 1895 of the Missouri General Assembly expressly recognizing the right of choice of foreign law, *supra*.

The distinction between a domestic corporation and a foreign corporation invested by a State with powers similar to a domestic corporation, has been frequently considered by this court in questions of jurisdiction. Thus in Louisville, etc., R. R. Co. vs. Louisville Trust Co., 174 U. S., 552, where it was claimed that the plaintiff, an Indiana corporation, afterwards became a corporation of the State of Kentucky, the court said, (page 562):

"This court has often recognized that a corporation "of one State may be made a corporation of another "State by the legislature of that State, in regard to prop "erty and acts within its territorial jurisdiction. Ohio & "Mississippi Railroad Company, vs. Wheeler, 1 Black, "286, 297; Railroad Co. vs. Harris, 12 Wallace, 65, 82; "Railroad Co. vs. Whitton, 13 Wal., 270, 283; Railroad "Co. vs. Vance, 96 U. S., 450; Memphis & Charleston "Railroad Co. vs. Alabama, 107 U. S., 581; Clark "vs. Barnard, 108 U. S., 436, 451, 452; Stone vs. Farm-

"ers' Loan & Trust Co., 116 U. S., 307, 334, Graham vs. "Boston, Hartford & Erie Railroad, 118 U. S., 161, "169; Martin vs. Baltimore and Ohio Railroad, 151 U. "S., 673, 677. But this court has repeatedly said that, in "order to make a corporation, already in existence under "the laws of one State, a corporation of another State, "'the language used must imply creation or adoption in "'such form as to confer the power usually exercised "'over corporations by the State, or by the legislature, "'and such allegiance as a State corporation owes to its "'creator. The mere grant of privileges or powers to it "'as an existing corporation, without more, does not do "'this.' Pennsylvania Railroad vs. St. Louis, Alton and "Terre Haute Railroad, 118 U. S., 290, 296; Goodlett vs. "Louisville and Nashville Railroad, 122 U. S., 391, 405, "408; St. Louis and San Francisco Railway vs. James, "161 U. S., 545, 561."

But it is needless to extend this discussion. So far from claiming that the statute in question made plaintiff in error a Missouri corporation, and therefore its contracts domestic contracts, the court denies the liberty of contract in making a choice of law on the very ground that it was a foreign corporation doing business in the State *ex gratia* through the comity of the State. In other words, the court holds that the contract was a Missouri contract, despite the express agreement of the parties, *because* the plaintiff in error was a foreign corporation.

XI.

This right of choice of the applicatory law, subject to the foregoing qualifications, is inherent in the conception of an interstate contract, and the statute of Missouri as construed by the Supreme Court of that State, deprives the parties to an interstate mutual life insurance contract of this essential element of the right of interstate contract.

As already seen, the right of choice of the applicatory law is inherent in the relation of the parties to an

interstate contract, subject. of course, to the foregoing qualifications, that the choice must be made in good faith and in furtherance of the contract, and shall not be in violation of the law or the public policy of the State wherein the foreign law is sought to be enforced. This right of choice is inherent in the conception of an interstate contract; that is to say, the right grows out of the relation—*i. e.* out of the existence of two systems of law to which the parties are severally subject, and with reference to which they had a right to contract. In the familiar case where the citizens of two different countries make a contract to be performed in a third, the right of choice will be extended to the third country, and in default of the express exercise of the right of choice, the intention of the parties will be inferred from the established legal presumptions of such intention, see Dicey, p. 170, *supra*. For an illustrative case of the selection from the laws of *four* States, see Hubbell vs. Morristown Land and Improvement Company, p. 47, *supra*.

The term "conflict of laws" has been criticised by the later writers on the subject as being inaccurate (see Dicey on Conflict of Laws). Mr. Dicey says that the term "conflict of laws" has been defended on the ground of its applicability, not to any collision between the laws themselves, but to a conflict in the mind of a judge as to which law shall govern a given case. But he says this only gives a forced and new sense to a received expression. He prefers the term "private international law," for, he says, "it brings into light the great and increasing "harmony between rules as to the application of foreign "law which prevail in all civilized countries."

This same thought is expressed by Chief Justice Marshall, in Wayman vs. Southard, *supra*, where he speaks of the principle as one of *universal* law.

It necessarily follows that it is wholly immaterial in the application of these principles of universal law that

one of the parties was a foreign corporation. It is true, it is said, that the contractual capacity of a corporation is limited by the law of its creation, as well as by the law of the State where the transaction takes place. That is to say, it may be prohibited from making certain contracts, but such contracts, as it does make, *must* be attended by the *inherent incidents* of all interstate contracts, to-wit, the right of choice of the applicatory law.

We accept in this court, as we are bound to do, the construction placed upon the statute by the Missouri court. It is conceded in the opinion that, but for the statute, the contract between the parties would have been a New York contract, the parties having admittedly contracted with reference to that law, and, we may add, that being the only law under which their engagements could have been made effective.

But this liberty of contract is denied by the Missouri court, on the ground that it is nothing but an attempted waiver of the provisions of the Missouri statute. Thus the court in its opinion cites the Clements case, 140 U. S., 226, and states that this case presents an element which that case did not, to-wit, the express agreement of the parties with reference to the New York law. But the court construes the statute as prohibiting the parties from contracting with reference to the New York law, saying, Rec., p. 59: "The rule to be deduced from the authori-"ties seems to be that when no statute intervenes prohib-"iting it, a corporation doing business by permission in "another State from that of its incorporation may, by "contract, make the law of the State of its incorporation "the applicatory law of the contract; but that where the "laws of the State in which it does business by license "prohibits such corporations from making certain kinds "of contracts, they can only act in accordance therewith."

While this is not very clear, and seems to assume that there is but *one* party to a life insurance contract, to-wit, the corporation, it certainly means, in the light of the con-

text, this much, that the statute in question prohibits the parties to an interstate mutual life insurance contract, where one of the parties is a citizen of Missouri and the other a foreign company doing business in Missouri, from agreeing upon the applicatory law.

The position of the court in this construction of the statute is further illustrated by its opinion involving the same statute, in another case now pending in this court on writ of error, that of Horton vs. New York Life Ins. Co., 151 Mo., 604.

There it was contended, as here, that the place of contract was fixed by the express agreement of the parties, but that, irrespective of that agreement, it was made a New York contract by the acts of the parties. The court there holds that the contract was not complete until the poliey was delivered in Missouri, saying: "Under "these conditions, the contract was not complete until the "policy was delivered in this State, and *therefore* it is a "Missouri contract." The court reaffirms the decision in this case in holding that it was *incompetent* for the parties to contract with reference to the New York law.

Thus we have this anomalous situation—the fundamental principle of international law, or, as Chief Justice Marshall terms it, *universal* law, that it is the will of the contracting parties which fixes the place of contract, is ignored. That is, it is held incompetent for them to have any will in the matter, and yet the court determines the law of the contract from what it finds to be the place of contract, entirely overlooking, that the law of the place of contract *lex loci contractus*, and the place of performance *lex loci solutionis*, are both of them presumptions grounded on the *probable intention* of the parties. See Dicey, Conflict of Laws, p. 570.

Thus the court holds, in the same opinion, that it is unlawful for the parties to have *any* intent, and yet undertakes to give effect to circumstances, whose only value in

law is as indicative of such intent. Could there be a more complete ignoring of the fundamental rules of universal law? With all due respect to the learned court, is not this in line with the logic, which holds that the policy is a Missouri contract *because* of the statute, and the statute is a part of the contract, *because* it is a Missouri contract! *Curriculum nefas!*

Such is the anomaly, the *confusion*, which results from this attempted ignoring of the rules of universal law.

XII.

The statute of Missouri, as construed by the Supreme Court, not only denies to the contracting parties, in making an interstate contract, the right of choice of the applicatory law, but makes a new contract for the parties which they would not have made and contrary to their intent.

The parties in this case made a contract of insurance, embodying a plan deliberately selected and adopted, whereunder the insured associated himself with the other members of the tontine class, and the members of such class acquired reciprocal contingent interests in the event of survivorship in all the policies of the members of the class. As an incident to this plan of insurance and necessary thereto, the surplus accumulations over and above the reserve of the respective policies, were held for the benefit of the survivors. All of the policies of the class contained the same provision for paid-up insurance in the event of default, and none contained any provision for temporary or extended insurance. The features of the plan of insurance have been already explained.

See "Tontine Insurance," Section VII, *supra*.

As already pointed out, it was essential to this plan of insurance that there should be one applicatory, proper

law controlling the policy, and it is obvious that the parties contracted with reference to such law, as their contract could not be performed under any other.

The Supreme Court of Missouri in its opinion says that the statute was written into the contract and controlled its terms.

The doctrine is well settled that the existing law, the unwritten as well as the written law, is presumed to be incorporated into the contract. The general law is thus stated by Washington, J., in Ogden vs. Saunders, 12 Wheaton, 258:

"The law, then, which has this binding obligation, "must govern and control the contract in every shape in "which it is intended to bear upon it, whether it affects "its validity, construction, or discharge. * * * It is, "then, the municipal law of the State, whether that be "written or unwritten, which is emphatically the law of "the contract made within the State, and must govern it "throughout, wherever its performance is sought to be "enforced."

The parties to the contract are conclusively presumed to have *intended* to be bound by the existing law. The law of the contract always envelops it. Every contract must have one applicatory law and but one—that which Savigny calls its own proper law.

The law is written into the contract because the parties are conclusively presumed to have contracted with reference to that law.

But the doctrine has its obvious limitations, illustrated by the case at bar. The doctrine rests upon presumed *intention*. Parties are conclusively presumed to have contracted with reference to the existing law governing their contract, and of course they cannot contract in violation of the law. But statutory provisions cannot be written into contracts unless they are consistent and reconcilable with the contract which the parties did make.

If the statute cannot be read into the contract without defeating the obvious purpose of the parties in the essential terms of the contract and making a new contract for them, the doctrine has no application.

If the statute cannot be reconciled with the contract, there is simply a void attempt to contract in violation of the statute. The State can defeat the attempt, can refuse to enforce the contract, and can punish the illegal attempt and can forfeit the license of an offending corporation which is a party to such illegal attempt. But to make a different contract for the parties than that which they intended to make, and did make, and enforce it as a contract, is beyond the power of the State.

The obvious limitations of the legal principle invoked by the Missouri court as to the writing of statutes into contracts, are illustrated by the language of the same court in the cases cited in the opinion in support of this position. Thus it was said in State to the use of Wolf vs. Berning, 74 Mo., 87, and repeated in Reed vs. Painter, 129 Mo., 680:

"Whatsoever the law annexes as the *incident* of a "contract, whether granting a privilege or announcing a "prohibition, it is as much a part and parcel thereof as "though written therein or endorsed thereon."

See also Straube vs. Ins. Co., 125 Cal., 677.

The limtations of this doctrine could not be better illustrated than in the case at bar. This is not a case where the statute merely annexes a single incident, or prohibits an attempted exemption from liability, as in the case of contracts of carriers, so that the illegal stipulation can be removed without affecting the substance of the obligation.

In the case at bar the right of recovery is based upon the right of temporary or extended insurance to which the parties did not agree, but made a dif-

ferent contract inconsistent therewith. The statute cannot be read into the contract without making a new contract for the parties. It follows, therefore, that the parties to this cause, upon the theory of the court that they could not contract with reference to the New York law, made an ineffectual attempt to exercise the liberty of contract in making an interstate insurance contract, whereby the insured and citizens of other States acquired reciprocal rights and interests in a common fund.

Assuming that such a contract was illegal, the attempt would be void, and all that the law could do would be to refuse to enforce the contract and punish the attempt. Whether in such case there would be any right of action between the parties as not in *pari delicto*, it is immaterial in this case to inquire. This action is predicated upon the theory, which was sustained by the Missouri Snpreme Court, that the statute made a new contract between the parties, despite their intent. That is, it compelled them, *ex proprio vigore*, to be parties to an official type of contract which is inconsistent with the contract which they did make.

But it is not strictly accurate to say that the statute as construed by the opinion of the court makes a contract for the parties against their will. There is this qualification: It does have this effect at the option of the plaintiff. As heretofore shown (Point III, *supra*), the effect of this statute so construed is to give plaintiff the choice of two contracts—the contract which the parties did make and intended to make, and the one which the statute makes for them. While the Supreme Court was considering this very case, the Missouri Court of Appeals (the court having final jurisdiction in the cause) at Kansas City, Linn vs. N. Y. Life Ins. Co., 78 Mo. App., 192, was construing the same form of policy as a New York contract, according to the intent of the parties, and applying

the New York law as construed by the New York courts thereto.

XIII.

The selection in good faith of the applicatory law is an essential incident to the right of interstate contract, and the Missouri statute construed by the Supreme Court as denying this liberty of contract in this essential incident of interstate contract and making a new contract for the parties, violative of their intent, is violative of the constitutional guaranty of liberty of contract in the Fourteenth Amendment, which includes the right, thus denied, as essential to the right of interstate contract.

As we have heretofore pointed out the right to select in good faith the applicatory law of an interstate contract —or, as Mr. Dicey terms it, the *choice of law*—is inherent in the conception of such contract as a principle of universal law controlling the same. It cannot be denied without destroying the right of interstate contract itself. This is forcibly illustrated in the case at bar, where the denial of the right to select an applicatory law governing the contracts relating to this common insurance fund, necessarily destroys the mutuality which adheres in the very nature of such relation.

That liberty protected by the Federal Constitution means more than freedom from physical restraint and includes liberty of contract, is established by Allgeyer vs. Louisiana, *supra*, where the principle was applied to the case of an insurance contract. That case, it is true, is one where the right to contract was for insurance outside of the State on property within the State, and it was held that this was a right of which the State could not deprive its citizens. The court said there that "the mere fact "that a person may be within the limits of a particular "state does not prevent his making a contract outside of

"its limits, while he himself remains within it." The case at bar involves a far more serious invasion of the right to contract, since the statute as construed takes from all mutual life insurance interstate contracts an essential feature thereof, to-wit, the right of *choice* of the applicatory law, which grows out of the very fact that they are interstate contracts; or rather under the anomalous conditions resulting from such a holding, giving plaintiff *alone* the right of choice of the applicatory law.

In Frisby vs. United States, 157 U. S. 160, the court conceded that among the inalienable rights of citizens is that of liberty of contract, yet holding at the same time, what we freely concede, that such liberty is not absolute and universal. It is not denied that the right of contract is subject to the reasonable exercise of the police power, and that the right of contract may be legitimately regulated where the parties are not on an equal contractual plane, or where the public health demands that one party to the contract should be protected against himself. There is nothing in our position inconsistent with the views of the court in Holden vs. Hardy, 169 U. S. 366. The case at bar presents no such question, nor does the Missouri court attempt to sustain its position on any theory that the citizens of the State require protection from themselves in the insurance of their lives.

The citizens of Missouri who take out insurance policies on their lives are not a helpless or dependent class, as employes in certain employments may possible be said to be at the mercy of their employers. On the contrary, they are the most responsible and intelligent class in the community. It is a matter of common knowledge that the parties to interstate life insurance contracts, such as that at bar, are in every sense, intellectually and morally, as well as physically, a *selected* class. The business of insurance is not affected with any public use in the legal sense. No public franchise other than that of incorpora-

tion is exercised, and it is notorious that the business is exposed to the severest competition. In fact, it may be safely said that there is no business in modern society which is so completely based upon personal solicitation upon the part of one of the contracting parties, that is, the insurance company soliciting applications. There is no reason based upon any reasonable exercise of the police power, why a citizen of Missouri should not have the right to determine for himself on what conditions he will insure his life, and *a fortiori* in an interstate contract of life insurance, the parties, *not one party only*, shall not have the right of choice which inheres in the relation under the rules of universal law.

But it is unnecessary to extend this discussion, as the question is not one of any reasonableness in the exercise of the police power, but of the right of the State to destroy the right of interstate contract.

No State has gone beyond the State of Missouri in its assertion that contractual liberty is protected by the constitutional guarantees. Thus State vs. Loomis, 115 Mo., 307, holds the so-called anti-truck law of that State void as an unconstitutional interference with the right of private contract, and the language of the court in this case is quoted approvingly by this court in Railroad Co. vs. Ellis, 165 U. S., 150. Thus the court says:

"The word 'liberty' as used in these constitutional "declarations means more than freedom of locomotion. "It includes and comprehends, among other things, free- "dom of speech, the right of self-defense against unlaw- "ful violence and the right to freely buy and sell as others "may. 2 Story on Constitution (5th Ed.) Section 1590. "From the foregoing descriptions and definitions of due "process of law, or its equivalent law of the land, it must "be evident that this constitutional safeguard condemns "arbitrary, unequal and partial legislation; and it is "equally clear that the right to make contracts and have "them enforced as others may, is one of the rights so "secured to every citizen. * * *"

"Liberty, as we have seen, includes the right to con-
"tract as others may, and to take that right away from a
"class of persons following lawful pursuits, is simply
"depriving such persons of a time-honored right which
"the Constitution undertakes to secure to every citizen.
"Applying the principles of constitutional law above cited
"we can come to no other conclusion than this that these
"sections of the statute are utterly void. They attempt
"to strike down one of the fundamental principles of con-
"stitutional government. If they can stand, it is difficult
"to see an end of such legislation, and the government
"becomes one of special privileges, instead of a compact
"to promote the general welfare of the people. We place
"our conclusion on the broad ground that these sections
"of the statute are not due process of law within the
"meaning of the Constitution."

After citing decisions of other States, the court says:
"The differences, such as they are, (in the cases)
"strengthen rather than weaken the conclusion which we
"have before expressed; for it must be evident that they
"all teach this doctrine, that constitutional declarations
"concerning the liberty of the citizen, though using dif-
"ferent words, are not to be reduced to an empty sound.
"Liberty, we have seen, includes the right to acquire
"property, and that means and includes the right to make
"and enforce contracts. We do not say that such rights
"cannot be regulated by general law, but we do say that
"the Legislature cannot single out one class of persons
"who are competent to contract, and deprive them of
"rights in that respect which are guaranteed to other per-
"sons. The constitutional declaration that no person
"shall be deprived of life, liberty or property without due
"process of law, was designed to protect and preserve the
"existing rights against arbitrary legislation, as well as
"against arbitrary executive and judicial acts. The sec-
"tions of our statute in question, deprive a class of per-
"sons of the right to make and enforce ordinary contracts,
"and they induce a system of *State paternalism* which is
"at war with the fundamental principles of our govern-
"ment, and as we have before said, are not due process
"of law."

In State vs. Julow, 129 Mo., 163, the court still more emphatically asserts the same principle of constitutional protection of liberty of contract, holding void the act of 1893, which made it unlawful for an employer to prohibit an employe from joining or requiring him to leave a trade union. The court says that this is a violation of the liberty and property rights secured by constitutional guarantee. "The rights thus guaranteed are something more "than mere privileges of locomotion; the guaranty is neg- "ative to arbitrary power in every form which results in "the deprivation of a right." The same broad construction of the constitutional guaranty in favor of liberty of contract under the State constitutions has been enforced in the other States. Thus, in Illinois:

Miller vs. People, 117 Ill., 294.

Trover vs. People, 141 Ill., 171.

Ramsey vs. People, 142 Ill., 380.

Braceville Coal Co. vs. People, 147 Ill., 66.

Richey vs. People, 154 Ill., 98.

Harding vs. People, 160 Ill., 459.

following the Loomis case.

So also in Massachusetts:

Commonwealth vs. Perry, 155 Mass., 117.

In California:

Ex-parte Ruback, 85 Cal., 274.

Johnson vs. Goodyear Rubber Co., 59 Pac. Rep., 304.

In Pennsylvania:

Goodcharles vs. Wiseman, 113 Pa., 431.

In New York:

Ex Parte Jacobs, 98 N. Y., 98.

People vs. Marks, 99 N. Y., 377.

People vs. Gibson, 109 N. Y., 389.

In West Virginia:

State vs. Goodwell, 33 W. Va., 179.

In Nebraska:

Low vs. Reese Printing Co., 48 Neb., 127.

South Dakota:

State vs. Scougal, 51 N. W. Rep., 858; 15 L. R. A., 477.

Many of these cases, especially those from Missouri and Illinois, held invalid statutes enacted in the interest of the so-called wage-earning classes, but it will hardly be contended that this is the only class not to be placed under legislative guardianship in determining what is best for their own interests!

XIV.

There is no judicial precedent sustaining the contention of defendant in error.

It is true that in Equitable Life Ins. Co. vs.. Clements, 140 U. S., 226, affirming 32 Fed. Rep. 33, the Supreme Court held that the Missouri non-forfeiture law, being enacted from consideration of public policy, was incapable of waiver between the parties. But this was held only after the policy contract in suit was held upon the evidence to be a *Missouri contract*, and therefore subject to the Missouri law. It seems that it did not even appear that the obligation was accepted in New York, much less that the parties had expressly agreed upon the

law of New York as the applicatory law of the contract. The basis of the decision is clearly shown in the official syllabus.

"A policy of insurance executed in New York by a "New York corporation, doing business in Missouri, upon "an application signed in Missouri, by a resident of "Missouri, made part of the contract, and declaring that "it should not take effect until the first premium shall have "been actually paid during the lifetime of the person pro- "posed for insurance, which is delivered and the first "premium paid in Missouri, is *in the absence of evidence "of the company's acceptance in New York*, a Missouri "contract and governed by the laws of Missouri."

That is to say, there being nothing in the record to show that the parties expressly contracted with reference to the laws of New York and nothing to show the acceptance of the application in New York from which the court could have inferred the intent of the parties, the court gave legal effect to the acts of the parties and applied the law of Missouri. It seems too clear for argument that if the court entertained any such doctrine, as that which is necessary to support plaintiff's position, that insurance contracts are *sui generis*, and are not subject to the general rules of private international law, and that the expressed intent of the parties thereto is to be disregarded in determining their status, the court certainly would not have rendered the opinion which it did. There is nothing in the opinion which warrants the conclusion that the court intended to overrule the law as deliberately declared in case of Washington Co. Bank vs. Hume, 128 U. S., 195, and Pritchard vs. Norton, 106 U. S., 124, *supra*.

But it conclusively appears that the case in 140 U. S., 226, is not a precedent for the case at bar, for these reasons: *First*, in that, in that case, there was no evidence that the application was *accepted in New York;* in this case it is admitted. *Second*, in that case there was no

express agreement of the parties as to the law of New York; in this case there is.

It is sufficient to say of Knight Templar Co. vs. Berry, 1 C. C. A., 561, affirming 46 Fed. Rep., 439, and of Winning vs. Equitable Life Assurance Soc., 58 Fed. Rep., 34, and 7 C. C. A., 359, that in neither of these cases was there any evidence of agreement as to the applicatory law, and therefore the decision of this court in the Clements case was followed.

The same may be said of the decision in Hicks vs. Ins. Co., 60 Fed. Rep., 692, cited by the Missouri court.

As to the opinion of the District Judge in 13 Fed. Rep., 526, in the case of Fletcher vs. Insurance Co., it is sufficient to say that the decision of the Circuit Court was reversed in 117 U. S., 519, this court holding that under a policy similar to the one in suit, the stipulation that the company was not bound by the oral statements of the soliciting agent, but only by the written applications forwarded to the home office, was valid, the lower court having held that the company could not make such a stipulation in its policies.

There is nothing in the subsequent case of Continental Ins. Co. vs. Chamberlain, 132 U. S., 354, inconsistent therewith, nor with the position herewith maintained. The latter case gave effect to a statute of Iowa, which made the local agent the agent of the company, and not of the assured, there being no question but that this was within the legitimate police regulation of the State. See remarks of Harlan, J., in Maier vs. Ins. Co., 78 Fed. Rep., 566.

The often cited case of Paul vs. Virginia, 8 Wallace, 158, affords no support to the contention here involved. That was the case of a fire insurance company making contracts of indemnity with citizens of Virginia against the loss by fire of property located in Virginia, and it was held that the company doing business in Virginia was

properly subjected to pay the license charges imposed by the Virginia law; that the business of fire insurance was not interstate commerce, and that corporations were not citizens within the meaning of Section 2, of Article IV of the Constitution. Whether the business of mutual life insurance is to be differentiated from that of fire insurance as to the commerce clause, will be hereafter considered. But nothing in that case affords any support to the contention here.

Neither is the recent case of Insurance Co. vs. Daggs, 172 U. S., 557, involving the so-called "valued policy" law of Missouri, in point. This policy was a fire insurance case, but it was conceded apparently that the contract was subject to the Missouri law, there being no claim that the parties contracted with reference to any other law, the only question being as to the validity of the statute, which required all fire insurance policies to be valued polices. The court held that this restriction of the business of fire insurance to that class of policies, was a legitimate exercise of the police power of the State, "being a change from one kind of indemnity policy to "another kind, from open policies to valued policies, "both of which are sanctioned by the practice and "law of insurance. And this change is the only com- "pulsion of the law. *It makes no contract for the par- "ties.* In this it permits absolute freedom."

No question was suggested of the applicability of the statute, growing out of the right of choice inherent in an interstate contract, and the court took judicial notice of the "practice and law of insurance."

In Dolan vs. Mutual Reserve Fund Life Association, 173 Mass., 197, the remarks of the court as to the validity of an endorsement printed on the back of the policy, that it should be governed by the laws of New York, were clearly *dicta*, in view of the holding that the endorsement could not be considered as a part of

the contract, as it did not conform to the statutory requirement in being embodied in the contract.

The reference of the court to the Admiralty cases, "Branford City," 29 Fed. Rep., 373, and following cases did not justify the *dicta*, as these decisions related to the validity of stipulations for foreign law in contracts of carriers, whereby exemption from the negligence of employes was secured, such exemptions being held by the American courts to be against public policy and unenforceable in our courts. Such stipulations for the foreign law violate both of the essential conditions of the legitimate choice of law. They are not made in good faith in furtherance of the purposes of the contract, but in evasion of the local law, and are obnoxious to the public policy of the State where sought to be enforced. In other words, such stipulations are directly the *opposite* of the one involved in the case at bar.

XV.

The Missouri statute, as construed by the Supreme Court of that State, denying the right to select, in good faith, the applicatory law of a contract of mutual interstate life insurance, and making a new official contract violative of the intent of the parties, thus essentially denying the right to make interstate contracts of life insurance, was in effect an attempted regulation of commerce between the States.

We have thus far discussed the case upon the theory of the Missouri court, that mutual life insurance companies fall fully within the doctrine of Paul vs. Virginia, 8 Wallace, p. 168, and that the State had the right to exclude the same from doing business within its limits, if it had seen fit to exercise this power. Accepting that doctrine to the fullest extent, and conceding all that may be claimed for the power of the State to enact discriminating

legislation, by way of taxatio nor otherwise, as a condition of giving its assent to the admission of such corporations into the State, we submit that the statute as construed by the Missouri Supreme Court cannot be sustained, and that the right of interstate contract, with its essential incident of agreeing in good faith upon the applicatory law, is protected by the Federal Constitution.

So clear does the case seem in this regard, that it may be deemed unnecessary to present to the considerate judgment of the court, that the business of mutual life insurance as now developed in this country, which was practically unknown at the time of the formation of the constitution, is clearly to be differentiated in principle from the insurance business considered by this court in Paul vs. Virginia, 8 Wallace, and following cases. We do not overlook that it has been repeatedly held by the court that contracts of fire insurance do not constitute interstate commerce, and that this doctrine has been reaffirmed in Insurance Co. vs. New York, 119 U. S., 110, and in Hooper vs. California, 150 U. S., 648, and extended to the business of marine insurance; nor do we overlook the difference between commerce and the incidents of commercial intercourse, heretofore declared by this court.

None the less, there are fundamental differences between the relation of mutual life insurance, affected by interstate contracts, through the instrumentality of the mutual companies such as the plaintiff in error in this case, and contracts of either fire or marine insurance. The lat'er, as described in the opinion in Paul vs. Virginia, are contracts of indemnity, and nothing more. This is peculiarly the case with contracts of fire insurance discussed by the court in Paul vs. Virginia. There the considerations demanding local control are obvious. The contract involves indemnity against the loss by fire of property located permanently within the jurisdiction.

On the other hand, the insured in a life insurance policy, it is true, has in one sense the security of indemnity against the uncertainty of his individual life, but in a broader sense, as said by this court by Mr. Justice Bradley in the Statham case, *supra:* "The assured parties "are associates in a great scheme. This associate rela- "tion exists whether the company be a mutual one or not. "Each is interested in the engagements of all, for out of "the co-existence of many risks arises the law of aver- "ages, which underlies the whole business." There is nothing *local* in the life insurance contract. The assured may be in one State to-day and in another State or country to-morrow, and as is illustrated by some of the cases hereinbefore cited, the forum where the contract is finally enforced may be different from that, not only of the company, but that of the residence of the insured when the contract was made.

In Liverpool Ins. Co vs. Massachusetts, 10 Wallace, p. 573, the court said:

"The case of Paul vs. Virginia decided that the "business of insurance as *ordinarily* conducted was not "commerce, and that a corporation of one State having "an agency by which it conducted that business in "another State, was not engaged in commerce between "the States."

The very essence of the mutual interstate life insurance contract is the *associate relation.* Commerce in the constitutional sense has been held to be more than traffic —to include the means by which traffic is carried on. But it has to-day in the advancement of society and the multiplication of the forms and means whereby human intercourse is carried on, a much broader signification than when the constitution was adopted. In the words of Chief Justice Marshall, in Gibbons vs. Ogden, "com- "merce undoubtedly is traffic, but it is something more "—it is intercourse."

It is, therefore, submitted that the association of citizens of different States and countries in such organizations as the plaintiff in error for the purpose of protecting the uncertainties of the individual life through scientific ascertainment of the average life, is in its essence *commercial intercourse*, and as such belongs to national control; and therefore such right of association is entitled to be protected against such legislation as the Missouri statute, which, as construed by the Supreme Court of that State, renders this associate relation impossible.

The intimate and essential relation between this right of selection of the applicatory law in interstate contracts of mutual life insurance and the essential and foundation principles of *commercial intercourse*, is forcibly illustrated by the impressive language of Mr. Justice Story on Conflict of Laws (8th Ed.), Sec. 242.

"The rule (of enforcing the proper law of the "contract) is founded, not merely in the convenience, "but in the *necessities* of nations; for otherwise it would "be *impracticable* for them to carry on an extensive "*intercourse and commerce* with each other. The whole "system of agencies, of purchases and sales, of mutual "credits, and of transfers of negotiable instruments, rests "on this foundation; and the nation which should refuse "to acknowledge the common principles would soon find "its whole commercial intercourse reduced to a state like "that which now exists amongst savage tribes, among the "barbarous nations of Sumatra, and among other nations "of Asia washed by the Pacific. '*Jus autem gentium*,' "says the Institute of Justinian, '*omni humano generi* "'*commune est*; *nam, usu exigete, et humanis necessi*- "'*tatibus, gentes humanae jura quaedam sibi constituer*- "'*unt. Et ex hoc jure gentium, omnes pene contractus* "'*introducti sunt, ut emptio et venditio, locatio et con*- "'*ductio, societas, depositum, mutuum, et alii innumer*- "'*abiles.*" No more forcible application can be pro- "pounded of this imperial doctrine, than the subject of "international private contracts. In this, as a general "principle, there seems a universal consent of all courts "and jurists, foreign and domestic."

In Addyston Pipe and Steel Company vs. United States, 175 U. S., 211, the court discusses this commerce clause, and conceding that liberty of contract is protected by the Federal Constitution, holds that it is to a certain extent limited by the national power to regulate commerce, and speaking of certain confusion in the law resulting from our diverse sovereignties on subjects which are within State jurisdiction, says at page 233:

"They are results and the necessary accompaniment "of the division of sovereignty between the States on "the one hand and the Federal Government on the other, "and yet the enormous and inestimable benefits arising "from the existence of separate, independent and sover- "eign States have completely submerged the compara- "tively minor evils, inconsistent judgments and different "laws upon many of the subjects over which the States "have exclusive jurisdiction. But upon the matter of "interstate and foreign commerce, and the proper regula- "tion thereof, the subject being not alone national, but "international in its character, the great importance of "having but one source for the law which regulates that "commerce throughout the length and breadth of the "land, cannot, in our opinion, be overestimated."

So the subject presented in the case at bar is not only national, but international in character. The right of interstate contract in a subject which is essentially international as well as national, that of the scientific averaging of human life on the broadest possible basis of human experience, is destroyed by the Missouri statute under the construction given by the Missouri court.

As this court said *in re* Debs, 158 U. S., 591: "Constitutional provisions do not change, but their operation extends to new matters, as the modes of business and habits of life of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation on land was by coach and wagon and on water by canal boat and sailing vessel, yet

in its actual operation it touches and regulates transportation by modes then unkown, the railroad train and the steamship. Just so it is with the grant of the national government with power over interstate commerce. The constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce the future shall develop."

No better evidence of the essential national and international character of modern life insurance can be found than in the insurance departments of the several States, to which allusion has already been made. They exist in substantially all of the States, and without exception provide for licensing foreign companies and the valuation of policies by the recognized international standards of human experience. When Paul vs. Virginia was decided, the business of life insurance in this country was, to a great extent, local, that is, conducted through the domestic contracts by stock companies. The great and commanding organizations of the present day had hardly begun the amazing development which has made them the greatest associations of administrative trusts in the business world.

It is therefore submitted that the right of interstate contract in such a business, essentially national and international, is not a mere *incident* of commercial intercourse, but is *commercial intercourse* itself, and is therefore entitled to the protection of the national power in the regulation of commerce.

XVI.

The assertion of the constitutional protection of the right of interstate contract in mutual life insurance, and of the right of choice therein in good faith of the proper

law of such contract under the rules of universal law, in no wise impairs the just authority of the State in the exercise of its legitimate police power, or in its control over foreign corporations doing business through comity in the State.

There is nothing in the positions, which we have maintained, which in anywise impairs the just authority of the State in the full plentitude of its police power. If the position last discussed is held to be sound, and the business of mutual life insurance affected by interstate contracts is held to be essentially interstate commerce, and not to be included in the doctrine of Paul vs. Virginia, even on that theory the legitimate police power of the State in the protection of its people would be in no wise impaired. It could exact requirements of publicity, guarantees of solvency; in fact, make all the requirements that are now made by the several States in the administration of their respective insurance bureaus for the protection of the public. This court has frequently affirmed the State police regulation of the railroad systems, which are direct instruments of interstate commerce.

But on the other hand, assuming that the doctrine of Paul vs. Virginia applies fully to interstate contracts of mutual life insurance, the State would have also the power, if it chose to exercise it, to make all the contracts of the foreign insurance companies with its own citizens, *domestic* contracts, by requiring their reincorporation as domestic corporations. It could not prevent its own citizens from making interstate insurance contracts with corporations of other States, whether on the lives of the citizens of the State or on property located in the State, see Allgeyer vs. Louisiana, *supra*, although agents assuming to act in the State for such corporations without authority from the State could be punished by the State therefor, Hooper vs. California, *supra*. The State could prohibit

certain kinds of contracts from being made, or require all of its insurance contracts to be of a certain class, under the known practice and law of insurance, as in Insurance Co. vs. Daggs, *supra*. It could place such conditions as it chooses upon foreign corporations coming into the State, and enact discriminating legislation in the way of taxation in consideration of such privilege.

Assuming therefore the power of the State over the business of life insurance companies, if the foreign company is convicted of violating the State law prohibiting certain classes of contracts, it could be excluded from doing business in the State, and could find no remedy under the Federal Constitution, as recently declared in Waters-Pierce Oil Co. vs. State of Texas.

But the case at bar presents a very different question from any involved in the last cited case, or in any wherein the court has discussed the State control over the admission of foreign corporations not engaged in interstate commerce. Here is involved, not the right of control of foreign corporations, but the right of *interstate contract*. The contention here made is that the power of the State to exclude foreign corporations includes the right to change interstate contracts into domestic contracts, by giving one of the parties to an interstate contract the option of enforcing upon the other an official type of a domestic contract.

It is of the very essence of socialism, according to the definition by LeRoy Beaulieu, to substitute for a contract whose terms have been fully adopted and freely agreed to, *official types* of contracts.

Even if we concede the power of the State to say what contracts corporations shall make, concede that it has the same power over foreign as over domestic corporations, which is the utmost that can be claimed, it cannot, under the form of regulating the exercise of the right of contract, deny the *right* of contract.

A fortiori the State cannot say that a contract for one thing shall mean another thing. The power to invalidate contracts does not carry with it the power to make contracts. We compare this extraordinary position of the Missouri court in this denial of the right of interstate contract with the recent declaration of that court in State *ex rel* vs. Switzer, 143 Mo., p. 323, where the court said:

"Paternalism, whether State or Federal, as the deriva-
"tion of the term implies, is an assumption by the gov-
"ernment of a *quasi* fatherly relation of the citizen and
"his family, involving excessive governmental regulation
"of the private affairs and business methods and interests
"of the people, upon the theory that the people are incap-
"able of managing their own affairs, and is pernicious
"in its tendencies. * * * Paternalism is a plant
"which should receive no nourishment upon the soil of
"Missouri."

XVII.

The judgment of the Supreme Court of Missouri should be reversed.

FREDERICK N. JUDSON,
For Plaintiff in Error.

GEO. W. HUBBELL,
Of Counsel.

INDEX.

	PAGE
Statement	1–4
The Statute	4–8
Brief	9–45
The Contract a Missouri Contract	9–19
Statute Part of the Contract	19–20
Statute Cannot be Upset by Direct Waiver	21–23
Statute Cannot be Upset by Indirection	23–28
Bona Fides of Contracting Parties Immaterial	29–37
Statute as Construed Not Violative of Constitutional Guaranty	38–39
Statute as Construed Does Not Make New Contract for Parties	39
Statute Not a Regulation of Commerce	39–42
Statute Not Deprivation of Contractual Liberty Without Due Process of Law	43

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1899.

THE NEW YORK LIFE INSURANCE CO.,
Plaintiff in Error,

vs.

FANNY CRAVENS,
Defendant in Error.

No. 262.

Statement of the Case and Brief for Defendant in Error.

This is an action on a policy of life insurance issued by plaintiff in error, defendant below, on the life of John K. Cravens, who died Nov. 2nd, 1892. The beneficiary in the policy is Fanny Cravens, defendant in error, widow of the assured.

The purpose of the action is to recover extended or temporary insurance provided by Sections 5983 and 5985 of the Revised Statutes of Missouri, 1879.

This case was tried to the Court upon the pleadings and an agreed statement of facts, a jury being waived (Rec. 13). From the pleadings and the agreed statement, the following undisputed facts appear:

1. Plaintiff in error is a New York corporation and at all times mentioned was engaged in the business of life insurance in the State of Missouri by authority of her laws, and maintained offices, resident agents, and medical examiners in Missouri. (Rec. 14.)

2. On May 2nd, 1887, the local agents of plaintiff in error, solicited John K. Cravens, a resident of Missouri, at his residence in Missouri to insure his life in plaintiff in error's company. Thereupon and thereat Mr. Cravens signed and delivered to said local agents a written application for the policy in suit (Rec. 14, 15). This application was by its own terms and the terms of the policy made a part of the policy and contained the following provision (Rec. 25): "That under no circumstances shall the policy hereby applied for be in force until the actual payment to and acceptance of the premium by the company or its authorized agent during the life-time and good health of the person on whose life insurance is applied for."

This application was sent by said agent from Missouri to the home office of the company (plaintiff in error) in the City of New York. Thereupon and thereat plaintiff in error issued the policy in suit and transmitted same to Kansas City, Missouri, to its said agent who received same in Missouri and delivered same in Missouri to John K. Cravens and collected in Missouri at the time of said delivery the first premium called for by the policy. (Rec. 15.)

3. Four full annual premiums of $589.50 each were paid on said policy and each was paid annually as it fell due in Missouri to plaintiff in error (Rec. 15). The fifth and sixth annual premiums were due and unpaid at the time of the death of Mr. Cravens (Rec. 15).

4. On Nov. 2nd, 1892, Mr. Cravens died in Missouri and proof of death was made to plaintiff in error in due time and form. (Rec. 15.)

5. On May 11th, 1891, the date of lapse, the policy had acquired a net value of $1290.94 as computed under the rule provided by the statute of Missouri, hereinafter set out; and three-fourths of this amount taken as a net single premium for temporary insurance continued said policy in force to a date six years and forty-six days from and after the 11th day of May, 1891, and the policy, if subject to extended insurance as provided for by the statute, was in force at the date of Mr. Cravens' death. (Rec. 5, 16.)

By its answer plaintiff in error alleged that the policy in suit was issued in New York; that the premiums were payable there unless paid to persons designated by the company to receive them elsewhere; and that the insurance was payable at plaintiff in error's office in that State; that the policy provided that it should be controlled by the laws of New York; and that consequently the policy was subject only to the laws of New York and not within the purview of the Missouri Statute. The answer also alleged that the policy contained a different provision as to the application of past

premiums in case of lapse from that made by the Missouri, Statute and that in answer to one of the questions in the application for said policy the provisions of the Missouri Statute were agreed to be waived. The answer offers to pay defendant in error $2,670.00. The answer then sets up the unconstitutionality of the statute. (Rec. 6, 10.)

The opinion delivered by the Supreme Court of Missouri appears in the printed record, pages 49-64, and is based upon the grounds that the policy in suit was subject to the provisions of its Missouri Statute and that the waiver of the Missouri Statute and the agreement providing for the New York law as the applicatory law, were void because contrary to the terms of the Missouri Statute, and that the State of Missouri in enacting the statute acted within constitutional limitations.

THE MISSOURI STATUTE.

The several sections of the Revised Statutes of 1879, in force at date of this policy, relating to non-forfeiture of life insurance policies, are here inserted in full:

"Section 5983. Policies non-forfeitable, when. —No policies of insurance on life hereafter issued by any life insurance company authorized to do business in this State, on and after the first day of August, A. D. 1879, shall, after payment upon it of two full annual premiums, be forfeited or become void by reason of the non-payment of premiums thereon, but it shall be subject to the following

rules of commutation, to-wit: The net value of the policy when the premium becomes due and is not paid shall be computed upon the American experience table of mortality, with four and one-half per cent interest per annum, and after deducting from three-fourths of such net value any notes or other indebtedness to the company, given on account of past premium payments on said policy issued to the insured, which indebtedness shall then be cancelled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy, and the term for which such temporary insurance shall be in force shall be determined by the age of the person whose life is insured at the time of default of premium, and the assumption of mortality and interest aforesaid; but if the policy shall be an endowment, payable at a certain time, or at death if it should occur previously, then if what remains as aforesaid shall exceed the net single premium of temporary insurance for the remainder of the endowment term for the full amount of the policy, such excess shall be considered as a net single premium, for a pure endowment of so much as such premium will purchase determined by the age of the insured at date of defaulting the payment of premium on the original policy, and the table of mortality and interest as aforesaid, which amount shall be paid at end of the original term of endowment, if the insured shall then be alive.

"Sec. 5984. A paid-up policy may be demanded, when—At any time after the payment of

two or more full annual premiums, and not later than sixty days from the beginning of the extended insurance provided in the preceding section, the legal holder of the policy may demand of the company, and the company shall issue its paid-up policy, which in case of an ordinary life policy, shall be for such an amount as the net value of the original policy at the age and date of lapse, computed according to the American experience table of mortality, with interest at the rate of four and a half per cent per annum, without deduction of indebtedness on account of said policy, will purchase, applied as a single premium upon the table rates of the company, and in case of a limited payment life policy, or of a continued payment endowment policy payable at a certain time, or of a limited payment endowment policy payable at a certain time, or at death, it shall be for an amount bearing such proportion to the amount of the original policy as the number of complete annual premiums actually paid shall bear to the number of such premiums stipulated to be paid: Provided, that from such amount the company shall have the right to deduct the net reversionary value of all indebtedness to the company on account of such policy; and provided further, that the policy holder shall, at the time of making demand for such paid-up policy, surrender the original policy, legally discharged, at the parent office of the company.

"Sec. 5985. Rule of payment on commuted policy. If the death of the insured occur within the term of temporary insurance covered by the value

of the policy as determined in section 5983, and if no condition of the insurance other than the payment of premiums shall have been violated by the insured, the company shall be bound to pay the amount of the policy, the same as if there had been no default in payment of premiums, anything in the policy to the contrary notwithstanding: Provided, however, that notice of the claim and proof of the death shall be submitted to the company in the same manner as provided by the terms of the policy, within ninety days after the decease of the insured; and provided, also, that the company shall have the right to deduct from the amount insured in the policy the amount compounded at six per cent interest per annum of all the premiums that had been forborne at the time of the decease, including the whole of the year's premium in which the death occurs, but such premiums shall in no case exceed the ordinary life premium for the age at issue, with interest as last aforesaid.

"Sec. 5986. The foregoing provisions not applicable, when: The three preceding sections shall not be applicable in the following cases, to-wit: If the policy shall contain a provision for an unconditional cash surrender, value at least equal to the net single premium for the temporary insurance provided hereinbefore, or for the unconditional commutation of the policy to non-forfeitable paid-up insurance, for which the net value shall be equal to that provided for in section 5984, or if the legal holder of the policy shall, within sixty days after default of premium, surrender the policy and accept

from the company another form of policy, or if the policy shall be surrendered to the company for a consideration adequate in the judgment of the legal holder thereof, then, and in any of the foregoing cases, this act shall not be applicable."

BRIEF.

The Contract is a Missouri Contract.

Plaintiff in error is a foreign corporation organized under the laws of New York and before and during the period covering this controversy, with the permission of the State of Missouri, maintained offices and agents and did a general life insurance business in Missouri. (Rec. 14.) A citizen and resident of Missouri submitted to the local agent of plaintiff in error in Missouri a written application for insurance upon his life containing the following clause (Rec. 14, 15, 25):

"That under no circumstances shall the policy hereby applied for be in force until the actual payment to and acceptance of the premiums by the company or its authorized agent during the lifetime and good health of the person on whose life insurance is applied for."

This application was by plaintiff in error's agent transmitted to New York to the company, who there issued the policy in suit, with the clause above cited incorporated in it, transmitted same to Missouri to its said agent who afterwards delivered said policy to the insured in Missouri, and accepted from the insured the first premium in Missouri. (Rec. 15.)

Until, therefore, the health of the applicant was ascertained to be good and the premium was paid and the policy was delivered, all of which could only, and actually did, take place in Missouri, the matter stood thus: The application was an offer

to take the policy in suit upon the conditions specified; the company on issuing the policy made its offer to enter into the contract applied for, provided the applicant could discharge the above conditions at the time the policy should be presented to him by the company's agent in Missouri, and by placing its policy in the hands of its local agent, the company clothed said agent with authority to complete the contract. At the moment of delivery of the policy in Missouri to the applicant in good health and the payment of the premium to the local agent in Missouri, there arose the *consensus ad idem* and the two offers ripened into a binding contract of insurance in the state of Missouri.

To reinforce this conclusion, suppose that the applicant had died after the issuance of the policy and while it was in the hands of defendant's local agent, but before the premium had been accepted and the policy had been delivered. Or suppose when the local agent went to deliver it he had found Mr. Cravens ill. In either of these cases would an action for specific performance have lain? Certainly not; for the language of the contracting parties provides against the consummation of the contract until the acceptance of the premium by the company from the assured who shall be in good health at the time.

Kohen vs. Mut. Res. Fund Life Ass'n, 28 Fed. Rep., 705;

Messelhorn vs. Mut. Res. Fund Life Ass'n, 30 Fed. Rep., 545.

Noyes vs. Phœnix Life Ins. Co., 1 Mo. App. 584.

The utmost therefore that can be predicated of the application and the policy before the delivery of the policy, is that there was outstanding on the part of the insured an offer to purchase insurance of a definite amount of plaintiff in error and on the part of plaintiff in error a delegation of authority to its local agent, evidenced by the policy's being placed in his hands for delivery; to close on its behalf a contract of prescribed terms (the terms of the policy), with the applicant upon receiving from the applicant the first premium called for under the policy. The plaintiff in error and the applicant therefore met and made the contract in Missouri.

Giddings vs. Ins. Co., 102 U. S. 108.

In *Hicks vs. National Life Ins. Co.*, 60 Fed. Rep. 690, 692, decided by United States Circuit Court of Appeals, Wallace, Circuit J., says:

"If any authority were needed for the proposition that a policy applied for in New York, delivered there, and the premiums paid there, is a New York contract notwithstanding it is signed and issued by the insurer in another state, the reference is supplied by the case of *Assur. Soc. vs. Clements*, 140 U. S. 226. The delivery of the policies in the present case was made in New York city to an agent of the assured and in legal effect was as if the assured had been personally present and received them. Then and not before the policies took effect."

In *Northwestern Mut. Life Ins. Co. vs. Elliott et al.*, 5 Fed Rep. 225. An application for a

policy was made at Portland, Oregon, to the company's agent, who forwarded same to the company at Milwaukee, Wisconsin. The company thereupon, in Wisconsin, issued its policy, containing a clause, viz:

"This policy shall not take effect and become binding on the company until the premiums shall be actually paid during the lifetime of the person whose life is assured, to the company or some person authorized to receive it, who shall countersign the policy on receipt of the premium," and transmitted same to its agent at Portland, Oregon, who there delivered it to the insured.

Deady, J., says: "Where, then, was this contract made; in Wisconsin or Oregon? The answer to this question involves the inquiry, where did the final act take place which made this transaction a contract binding on the parties?

"The premium was paid to the agent of the plaintiff at Portland, who then and there countersigned and delivered the policy. This was the consummation and completion of the contract. But, to put this beyond a doubt, the policy itself declares that it shall not be binding on the company until these acts are performed. And until it was binding on the company it was not binding on the applicant; in short, it was not yet a contract, but only a proposition."

Pomeroy v. Manhattan Life Ins. Co., 40 Ills. 400.

Thwing v. Great Western Ins. Co., 111 Mass. 109.

Wood F. Ins., 189, note 2.
Hardie v. St. Louis Mut. Ins. Life Co., 26 La. Ann. 242.
St. Louis Mut. Life Ins. Co. v. Kennedy, 6 Bush 450.

In *Fletcher v. New York Life Ins. Co.*, 13 Fed. Rep. 526, where the policy was delivered in Missouri, to a citizen of Missouri, and the first premium there paid, the court held the contract was controlled by the Missouri law, and through Treat, J., says:

"The defendant company was doing business in Missouri, with the privileges granted to it here, when said insurance was effected. It may be that the formal acceptance of the proposed contract was, by the letter of the contract, to be consummated in New York. The broad proposition, however, remains, no artifice to avoid which can be upheld. The statutes of Missouri, for salutary reasons, permit foreign corporations to do business in the state on prescribed conditions. If, despite such conditions, they can, by the insertion of clauses in their policies, withdraw themselves from the limitations of the Missouri statutes, while obtaining all the advantages of its license, then a foreign corporation can, by special contract, upset the statutes of the state and become exempt from the requirements of law: Such a proposition is not to be countenanced. If the defendant corporation chose to embark in business within this state, under the terms and conditions named in the statute, it could not by paper contrivances, however specious, withdraw itself

from the operation of the laws by force of which it could alone do business within the state. To hold otherwise would be subversive of the right of the state to decide on what terms by comity a foreign corporation should be permitted to do business or be recognized therefor within the state jurisdiction. Each state can decide for itself whether a foreign corporation shall be recognized and on what terms. Primarily a corporation has no existence beyond the territorial limits of the state creating it, and when it does undertake business beyond, it does so only by comity. The defendant corporation having been permitted to do business in Missouri, under the statutes of the latter, was bound by all the provisions of those statutes, and could not, by the insertion of any of the many clauses in its forms of application, etc., withdraw itself from the obligatory force of the statute. The contract of insurance is, therefore, a Missouri contract, and subject to the local law." This opinion was concurred in by C. J. McCrary.

This case was taken to the supreme court of the United States and is reported in 117 U. S. 519. The case was there decided upon objections to instructions and reversed, but in the statement of facts Mr. Justice Field says:

"The company is a corporation under the laws of New York, but it also transacts business in Missouri, through agents residing there, and, of course, with reference to the business done in that state, is subject to its laws."

In the case of *Wall vs. Equitable Life Assur.*

Soc., 32 Fed. Reporter 273, a case directly in point, Brewer, J., says:

"The defendant is a New York corporation doing business in the state of Missouri; the insured was a citizen and resident of Missouri, and made his application here, which was forwarded to New York; the application was accepted, the policy fully prepared and signed in that state and sent to Missouri, and delivered to the applicant here. By the terms of the policy all premiums are payable at the defendant's office in New York. If the sum insured should become payable the payment is to be made at its office in New York. * * * * Under these facts, I have little doubt as to the true answer to be made to this first question, viz: 'Is the contract sued on governed and to be construed by the laws of the state of New York, or by the laws of the State of Missouri? In *White v. Insurance Company*, 4 Dill 177, it is held that the act of the legislature of the state of Missouri, March 23rd, 1874, in respect to policies of life insurance extends to all policies of life insurance delivered in this state after the act went into effect.' That was a suit against a foreign insurance company doing business in the state. In *Fletcher v. Ins. Co.*, 13 Fed. Rep. 526, it was held that a foreign insurance company can not withdraw itself from the operation of the statutes of a state in which it does business by insertion of clauses in its policies." That was a case in which the defendant company insisted that by virtue of certain clauses in the application the contract was to be finally and fully executed

in New York. In his opinion, an opinion concurred in by Circuit Judge McCrary, Judge Treat used this language:

"The defendant corporation having been permitted to do business in Missouri, under the statutes of the latter, was bound by all the provisions of those statutes, and could not, by the insertion of any of the many clauses of its forms of application, withdraw itself from the obligatory force of the statute. The contract of insurance is, therefore, a Missouri contract and subject to the local law."

"In view of these authorities and considering the reasoning of Judge Treat in the opinion above referred to, I deem it unnecessary to discuss the question further, and simply hold that the Missouri statues controls."

This case was appealed to the Supreme Court of the United States and affirmed in 140 U. S. 226.

Mr. Justice Gray says:

"Upon the question whether the question sued on was made in New York or in Missouri, there is nothing in the record except the policy and application, the petition and answer, by which the facts appear to have been as follows:

"The assured was a resident of Missouri, and the application for the policy was signed in Missouri. The policy executed at the defendant's office in New York provides that 'the contract between the parties hereto is completely set forth in this policy and the application therefor taken together.' The application declares that the contract shall not take effect until the first premium shall

have been actually paid during the life of the person herein proposed for insurance." The petition alleges that that premium and two annual premiums were paid in Missouri. The answer expressly admits the payment of the three premiums and, by not controverting that they were paid in Missouri, admits that fact also, if material. The petition further alleges that the policy was delivered in Missouri; and the answer, that the policy was, "at the request of the said Wall, transmitted to the state of Missouri and delivered to said Wall in said state." If this form of admission does not imply that the policy was, at the request of Wall, transmitted to another person, perhaps the company's agent, in Missouri, and by him there delivered to Wall, it is quite consistent with such a state of facts; and there is no evidence whatever, or even averment, that the policy was transmitted by mail directly to Wall, or that the company signified to Wall its acceptance of his application in any other way than by the delivery of the policy to him in Missouri. Upon this record the conclusion is inevitable that the policy never became a completed contract, binding either party to it, until the delivery of the policy and the payment of the first premium in Missouri; and consequently that the policy is a Missouri contract and governed by the laws of Missouri."

In *Equitable Life Assur. Soc. vs. Winnig*, decided by the United States Circuit Court of Appeals, October 16th, 1893, and reported in 58 Fed. Rep. 541, the Court, speaking through Thayer,

Judge, says: "As the assured was a resident of Saline county, in the state of Missouri, at the time he became assured, and the policy was delivered in that state, and the first premium was there paid, the contract evidenced by the policy is a Missouri contract, and is governed by the laws of that state within the rule announced in *Society vs. Clements*, 140 U. S. 226."

Stronger or more direct language to this effect cannot be found than that of Caldwell, Judge, in *Berry vs. Knights Templars' and Masons' Life Indemnity Company*, 46 Fed. Rep. at 440, viz: "It is said the policy is an Illinois contract, and to be construed by the laws of that state, but clearly this is not so. The company established an agency and carried on its business in this state. It was through that agency the assured, who was a citizen and resident of the state, made his application and received his policy. The fact that the policy was signed by the officers of the company in Chicago has no significance. It was transmitted to the company's agent in Missouri, who received the premium, called in this case an 'entrance fee,' and delivered the policy to the assured, at his home in this state, and it took effect at that place and from that date."

Not only is the policy in suit a Missouri contract, under the doctrine laid down in the foregoing distinguished Federal authorities, but the question involved has been passed upon by our own state court in the case of *Price vs. Connecticut Mut. Life Ins. Co.*, where the facts were identical with

those of the case at bar, and where the court, after considering the Wall case, adopted the views there expressed and held the contract to be a Missouri contract. 48 Mo. App. 281.

Mut. Benefit Ins. Co. vs. Robinson, 54 Fed. Rep. 580.

Paine vs. Ins. Co., 51 Fed. Rep. 689.

Winfield vs. Ins. Co., 53 Fed. Rep. 208.

Daggs vs. Ins. Co., 136 Mo. 392.

Orient Ins. Co. vs. Daggs, 172 U. S. 557.

Knights Templar, Etc. Co. vs. Berry, 50 Fed. Rep. 511.

Non-forfeiture law part of the contract.

The policy in suit was delivered in Missouri after the passage of the Missouri Non-Forfeiture Law, sections 5983, 5984, 5985 and 5986, Revised Statutes of Missouri, 1879, and these statutes are to be treated as incorporated in the policy.

In *White vs. Ins. Co.*, 4 Dill., at 182, where the question here involved was under consideration, Judge Dillon uses the following language: "We are of the opinion that policies issued and delivered in Missouri, after that act (referring to section 5849 Rev. Stat. of Mo. 1889) took effect, fall within its protective operation; and as to such policies, the act is to be treated as if incorporated therein."

And in *Hicks vs. National Life Ins. Co.*, 60 Fed. Rep. at 692, the circuit court of appeals says: "The policies being New York contracts, were of course dominated by the statute respecting forfeitures as completely as though the statutory conditions had been expressly incorporated in them."

And in *Havens vs. Germania Fire Ins. Co.*, 123 Mo. 403, where the question at issue involved a construction of Sec. 6009, Rev. Stats. 1879 of Mo., which provided that "any policy shall be written on real property, and the property shall be wholly destroyed, the amount of the insurance shall be taken conclusively to be the value of the property when insured, and the amount of loss and measure of damages when destroyed," the court held that this statute became a part of the policy, and that the stipulation in the policy must yield to the statute. The court says: "It is now the established rule that if the facts bring the case within the regulations prescribed by law, the statute enters into and forms a part of the contract of insurance as completely as if written into it." (Citing 4 Dill, *supra.*)

Bank vs. Hume, 128 U. S. 195, 207;

Christian vs. Conn. Mut. Life Ins. Co., 143 Mo. 460;

Daggs vs. Ins. Co., 136 Mo. 382;

Reid vs. Painter, 129 Mo. 680;

Reilly vs. Ins. Co., 43 Wis. 449;

Ins. Co. vs. Leslie, 47 Ohio St. 409;

Carter vs. Brooklyn Life Ins. Co., 110 N.Y. 15;

Phelan vs. Northwestern Life Ins. Co., 113 N. Y. 147;

Baxter vs. Brooklyn Life Ins. Co., 119 N. Y. 450;

McDougall vs. Prov. Sav. Life Ins. Co., 135 N. Y. 551.

Statute cannot be upset by direct waiver.

The direct waiver is contained in the policy in the following language (Rec. 18): "And all right, claim or interest arising under statute or otherwise to or in any other paid-up policy or surrender value and to or in any benefit or insurance whether required or provided by the statute of any State or not, is hereby expressly waived and relinquished."

(1) That this clause is without legal effect was settled by the case commonly known as the Wall case, reported in 32 Fed. Rep. 273, and on appeal in 140 U. S. 226, where, at page 233, the court, referring to the above statute, says: "The manifest object of the statute, as of many statutes regulating the form of policies of insurance on lives or against fires is to prevent insurance companies from inserting in their policies conditions of forfeiture or restriction, except so far as the statute permits. The statute is not directory only, or subject to be set aside by the company with the consent of the assured; but it is mandatory and controls the nature and terms of the contract into which the company may induce the assured to enter. This clearly appears from the unequivocal words of com mand and of prohibition above quoted, by which, in Section 5983, 'no policy of insurance,' issued by any life insurance company, authorized to do business in this state, 'shall, after the payment of two full annual premiums, be forfeited or become void by reason of the non-payment of premium thereon, but it shall be subject to the following rules of commutation,' and in section 5985, that if the assured

dies within the term of temporary insurance, as determined in the former section, 'the company shall be bound to pay the amount of the policy,' 'anything in the policy to the contrary notwithstanding.' This construction is put beyond doubt by Section 5986, which, by specifying four cases (two of which relate to the form of the policy), in which the three preceding sections shall not be applicable, necessarily implies that those sections shall control all cases not so specified, whatever be the form of the policy."

"It follows that the insertion in the policy of a provision for a different rule of commutation from that prescribed by the statute, in case of default of payment of premium after three premiums have been paid, as well as the insertion in the application of a clause by which the beneficiary purports to 'waive and relinquish all right or claim to any other surrender value than that so provided, whether required by the statute of any state or not,' is an ineffectual attempt to evade and nullify the clear words of the statute."

These views were adopted by the Missouri court of appeals in *Price v. Connecticut Mut. Life Ins. Co.*, 48 M. A. at 294, where the court says that, "where an insurance company does business in this state, and issues its policies to residents of this state, the validity of the clauses in its policies must be determined by the laws of this state. The laws of this state establish a rule of public policy which overrides the freedom of contract of the parties, and makes waivers of statutory provisions

ineffectual, although such waivers are contained in the strongest terms in the policies."

Statute cannot be upset by indirection.

The attempt to accomplish a waiver by withdrawing the policy from the protection and control of the laws of Missouri by providing that the policy should become a New York contract and should be governed by the laws of New York is to be found in the following language of the application made a part of the policy. (Rec. 25, §6.)

"That the entire contract contained in the said policy and in this application shall be construed and interpreted as a whole and in each of its parts and obligations according to the laws of the State of New York, the place of the contract being expressly agreed to be the principal office of said company in the City of New York," etc.

Resting as they do upon public policy these statutes cannot be abrogated by the device of indirection—

New York Life Ins. Co. v. Russell, 77 Fed. Rep. 94.

National Union v. Marlow, 74 Fed. Rep. 775.

Price v. Conn. Mut. Life Ins. Co., 48 Mo. App. 226.

Wall v. Equitable Life Assur. Soc., 32 Fed. Rep. 273.

Same case on appeal, 140 U. S. 226.

In the case of *Price v. Conn. Mut. Life Ins. Co.*, *supra*, the St. Louis Court of Appeals passed

upon the point, the agreement being viz: "It is agreed that the policy hereby applied for shall if granted, be held to be issued and delivered at Hartford, in the state of Connecticut, and it shall in all respects be construed and determined in accordance with the laws in that state." In addition was a clause directly waiving the Missouri non-forfeiture law. The court held the contract to be a Missouri contract observing that "the laws of the state establish a rule of public policy which overrides the freedom of contract of the parties and makes waivers of statutory provisions ineffectual although such provisions are contained in the strongest terms in the policies."

In *Mutual Benefit Life Ins. Co. v. Robinson*, where one of the questions involved was whether a contract of life insurance, delivered in the state of Iowa, to a resident of Iowa, should be governed by the Iowa statute or by the law of New Jersey, the contract itself providing that the law of New Jersey should govern, the court, after elaborately discussing the cases in point, held that the Iowa statute governed. And in *Berry v. Knights Templars' and Masons' Life Indemnity Co.*, 46 Fed. Rep. at 441, Caldwell, J., says (in deciding a case in which the policy waived and modified the suicide section of our statue): "Doing business in the state brings the policy within the operation of its laws, notwithstanding the policy may be signed and the loss made payable in another state. In such cases the company cannot, by any contrivance or device whatever, evade the effect and operation of

the laws of the state where it is doing business." * * * * "The statute is mandatory and obligatory alike on the insurance company and the assured. Its very object was to prohibit and annul such stipulations in policies and it cannot be waived or abrogated by any form of contract or by any device whatever. The legislative will, when expressed in the peremptory terms of this statute, is paramount and absolute and cannot be varied or waived by the private conventions of the parties." This language is approved in *Kellar v. Trav. Ins. Co.*, 58 Mo. App. 561.

The effect of the stipulation contained in the policy in suit, "that the policy shall be a New York contract," is to waive the laws of Missouri, section 5983 and 5984, which enter into and control every policy "issued by any life insurance company authorized to do business in the state," "anything in the policy to the contrary notwithstanding."

The agreed statement of facts, section 13, (Rec. 15) declares there is no absolute non-forfeiture law in the state of New York, and the insertion of this clause in the policy was to take from the assured the benefit of Missouri's law, by placing the contract under the force of the statute of a state where no such statute prevailed. This is, therefore, a device to evade and nullify our statute by indirection, a statute whose very object was to control every policy of life insurance entered into in Missouri, and which the courts have unanimously held to be mandatory and not subject to waiver.

Speaking of the scope, intention and effect of

The freedom of contract is involved equally in each case, and in each case must be denied; the court in the Price case recognizing that it was going beyond the Wall case in a matter of form, in refusing to give effect to the agreement that the policy should be held to be a Connecticut contract and observing that the difference between the two cases is not sufficient to distinguish them. It must be remembered that defendant is a foreign corporation doing business in Missouri, not by right, as would a natural person, but solely on account of legislative permission, and has authority to make only such contracts as the legislation of the State Missouri has given it authority to make. Missouri has passed mandatory statutes to control the nature and terms of defendant's contracts entered into here. The highest authority has held that these statutes are not made purely for the benefit of a private person unmixed with consideration of public policy and that they may not be set aside by direct waiver. To sustain defendant's argument that this may be accompained by an agreement entered into by the assured and defendant, "that the contract shall be a New York contract," is to permit defendant to accomplish the upsetting of these statutes by an adroit use of language, and would necessitate the overruling of both the Wall and Price cases, *supra.*

New York Life Ins. Co.v. Russell, 77 Fed. Rep. 94.

National Union v. Marlow, 74 Fed. Rep. 775.

Equitable Soc. v. Clements, 140 U. S. 226.

Bona fides of contracting parties immaterial.

Can the New York law be held to be the applicatory law on the ground that the policy provision making it the applicatory law is a *bona fide* attempt to provide the applicatory law?

The question has a double aspect and the answer depends, as suggested by the preceding cases, upon the public policy of the state where the question arises.

When the policy of the state in which a foreign corporation is doing business does not forbid, such corporation may make the law of the state of its creation the applicatory law.

Equitable Life Assur. Soc. vs. Nixon, 81 Fed. Rep. 796.

Penn. Mut. Life Ins. Co. vs. Mechanics Sav. Bank, 72 Fed. Rep. 413.

Mut. Life Ins. Co. vs. Hill, 97 Fed. Rep. 263.

The first of this group of cases was an action upon a policy of life insurance. The application was made in Washington and at the time of making the application the advance premium was paid to the company's agent in Washington, who was to forward it to the company in New York. The application provided that the insurance should not take effect unless the risk was approved and the premium accepted by the company in New York. By the terms of the policy all premiums and the loss under the policy were payable in New York, and proof of death was to be made in New York.

The company resisted payment on the ground that the contract provided for its own forfeiture for the non-payment of premium, and that the premiums had not been paid. There was no statute in the state of Washington affecting the right of the parties to provide for forfeiture.

The contract was held to be a New York contract and non forfeitable on account of the New York statute.

At page 798 the court, considering the first contention, says: "It would seem to be very clear therefore that the rights and obligations of the respective parties are to be measured and controlled by the laws of that state (New York), subject perhaps to any additional limitations or conditions imposed by the statute of the state, then territory (Washington) into which the defendant corporation went to solicit business in question; for it may be true that every corporation that enters a state other than that of its creation and there transacts business does so in subordination to the statutes of the state permitting its entry therein, and that no business transacted by virtue of the privilege thus conferred can by any sort of contract be removed from the operation of the statute of the state permitting the business to be transacted, but in the present case, as has been said, there is in Washington no statute affecting that portion of the policy here in question."

"The conclusion reached by the court below—which we think correct—that the contract in ques-

tion was a New York contract, is well supported by authority."

Wayman vs. Southard, 10 Wheaton 48.
Pritchard vs. Norton, 106 U. S. 124, 134, 141.
Bank vs. Hume, 128 U. S. 195, 206.
Coghlan vs. Railroad, 142 U. S. 116, 120.

"There is nothing to the contrary in the case of *Society vs. Clements*, 140 U. S., so much relied on by the plaintiff in error. In that case it appeared that the first premium was not paid by the assured until the delivery of the policy to him in the state of Missouri, and no other acceptance of his application for insurance by the company was made to appear. The contract involved in the present case was made when the application and the applicant's money were accepted by the insurance company—not before or after. It then became a completed contract, binding both parties to it. The place of its making, as well as the place of its performance, being the state of New York, there is no room to doubt that it is governed by the laws of that state."

Phinney vs. Mut. Life Ins. Co. 67 Fed. Rep. 493, is identical with the case last considered, and was determined in the same judicial circuit.

In *Penn. Mut. Life Ins. Co. vs. Mechanics Savings Bank and Trust Co.*, 72 Fed. Rep. 413, the foreign law stipulation in the policy provided "that the place of the contract shall be the city of Philadelphia, State of Pennsylvania."

The court gave effect to this stipulation and construed the policy according to the law of Pennsylvania.

The facts in this case do not show whether the policy in suit became a contract in Tennessee or in Pennsylvania, or whether there was in Tennessee a declaration of public policy such as is found in the Missouri statute limiting the contractual powers of insurance companies, while doing business in Tennessee, in the matter of providing for forfeitures. The consideration of the case is had without reference to any statute, and therefore the case is correctly decided and in nowise extends the doctrine laid down in *Wayman vs. Southard, supra.*

Where the policy of the state in which a foreign insurance corporation is doing business subjects the contracts of such corporation to the control of a statute, such corporation cannot withdraw its contracts then made from the control of such statute by providing in such contracts that such contracts shall be controlled by the laws of a different state. This rule finds illustration in the following group of cases:

New York Life Ins. Co. vs. Russell, 77 Fed. Rep., 94;

Price vs. Conn. Mut. Life Ins. Co., 48 Mo. App., 226;

National Union vs. Marlow, 74 Fed. Rep., 775;

Wall vs. Equitable Life Assur. Soc., 32 Fed. Rep. 273;

Same Case on Appeal, 140 U. S., 226.

In the first of these cases the application was made and the policy delivered in Nebraska to a citizen of Nebraska. The application and policy warranted that all statements and representations contained in the applications and all declarations made to the medical examiner were complete and true, and the contract further provided that no statements nor information made to the person taking the application should bind the company or in any manner affect its rights unless such statements and information were reduced to writing and presented to the officers of the company at its home office. To a certain question asked in the application the insured gave to the medical examiner of the company an oral answer which stated correctly the fact enquired about; the medical examiner, however, determined after personal examination of applicant that the answer given was not correct, and thereupon wrote into the application a different, and, as it afterwards turned out, an incorrect answer. The original answer of applicant was not reduced to writing nor made known to the officers of the company.

For the reason that the answer placed in the application by the company's medical examiner was in fact untrue and the answer as made by the applicant was not made known to the company, the company claimed that it had not received the information that its contract required that it should receive; that the knowledge of such facts by its local representative was not knowledge to the company and that therefore there could be no re-

covery upon the contract. The plaintiff contended that imparting the information to the representative of the company was under the statute of Nebraska imparting it to the company, and that the local agent's acts bound the company.

To this contention the company replied that its policy provided that it should be construed according to the laws of New York, the place of the contract being agreed to be the home office of the company.

The Court declined to give effect to the foreign law stipulation, and laid down the rule that to withdraw the policy from the control of the Nebraska statute was not within the contractual power of the parties.

In *Equitable Life Assur. Soc. vs. Nixon*, *supra*, and *Phinney vs. Mut. Life Ins. Co.*, *supra*, the intention of the parties as gathered from each contract showed that the parties made the contract with reference to the laws of New York. In *Penn. Mut. Life Ins. Co. vs. Mechanics Sav. Bank & Trust Co.*, *supra*, the parties left nothing to be supplied by intent, but made an express provision for the law of Pennsylvania as the applicatory law. These three cases are consequently identical in principle.

Each of these cases is correctly decided, for in the States of Washington and Tennessee these foreign corporations had been admitted subject to no conditions and clothed with every contractual power conferred upon them by their respective charters.

There is, however, a sound and very marked distinction between the foregoing and the following cases:

New York Life Ins. Co. vs. Russell, 77 Fed. Rep. 94.

Price vs. Conn. Mut. Life Ins. Co., 48 Mo. App. 226.

Equitable Life Assur. Co. vs. Clements, 140 U. S. 226.

National Union vs. Marlow, 74 Fed. Rep. 775.

In the latter cases the contracts became binding contracts in jurisdictions which possessed positive statutes, resting upon public policy, limiting, as a condition of the corporation's admission into the State, the contractual powers which the corporation might there exercise. Because of the limitation thus imposed the Russell and Price cases, *supra*, declined to give effect to the foreign law stipulation. And it is submitted that these cases do not extend the doctrine of *Equitable Assur. Soc. vs. Clements* 140 U. S. 226. In these cases there was no express stipulation for the application of the foreign law, but the intention of the parties to apply the New York law to the contract is manifested in the same way, and is as clear as it is in either the Nixon or Phinney cases, *supra*. The intention of the parties cannot furnish the rule because the parties to the contract are subject to the disability of the statute—plaintiff in error having assented thereto when it entered the State to do business therein.

The statute became a part of the contract at bar, and controls its nature, obligation and interpretation.

Liverpool Steam Co. vs. Phœnix Ins. Co., 129 U. S. 397.

Does the judgment of the Supreme Court of Missouri in construing the statute in controversy as denying to plaintiff in error the contractual power to withdraw its contract, entered into in Missouri with a citizen of Missouri, from the control of the Missouri statute, violate any privilege or immunity guaranteed to plaintiff in error by the Fourteenth Amendment of the Constitution of the United States?

"A corporation is not a citizen within the meaning of the provision and hence has not "privileges and immunities" secured to citizens against state legislation."

Orient Ins. Co. vs. Daggs, 172 U. S. 557;
Paul vs. Virginia, 8 Wall 168;
Bank of Augusta vs. Earle, 13 Pet 586;
Pembina Mining Co. vs. Pennsylvania, 125 U. S. 181.

Consequently the right of a state to prescribe conditions upon which foreign corporations, not agencies of the general government and not engaged in inter-state commerce, may be admitted to transact business within its borders has been frequently asserted and uniformly sustained.

Hooper vs. California, 155 U. S. 648, and cases cited.

The State of Missouri by the statute in controversy, a general statute applicable to all life insurance companies authorized to do business in the state, has simply restricted the exercise of the corporate powers of plaintiff in error, in the matter of the forfeiture of policies written within her boundaries as a condition of admission and the transaction of business. Such is the construction of this statute by the Supreme Court of Missouri. (Rec. 58.)

The reasoning that would enable plaintiff in error to withdraw its contracts here entered into from the control of the statute by making the law of New York, Maine or California the applicatory law would also give it authority to abrogate the statute by inserting into its contracts a clause of direct waiver. As suggested, *supra*, both of these devices are resorted to in the policy in suit. The legislature of New York could then create a corporate entity with contractual powers contravening the declared public policy of the State of Missouri and denied by Missouri to her own corporate creations and by virtue of the creative statute of New York this corporation would enter the State of Missouri, and here make its objectionable contracts by placing them under the control of the New York law. Missouri is thus forced to give extra territorial effects to the laws of New York. If she does not, then, says plaintiff in error, she abridges the privileges and immunities guaranteed to plaintiff in error by the Fourteenth Amendment. In view of the decisions, *supra*, this contention would seem to be anomalous.

That plaintiff in error is a mutual insurance corporation having no capital can be of no legal consequence. It is a corporation and as such is subject to the provisions of the statute.

The validity of the statute is denied under the Fourteenth Amendment on the ground that the statute destroys mutual life insurance, that the plan of insurance embodied in the contract in controversy is a well known type of insurance in which all parties insured in the same year constitute the same tontine class with the insured and thus each acquires a contingent intest in the event of survivorship in the other policies of the class—that to effectuate this plan the corporation issuing the policies embodying this plan should control all such policies by the same rule and that the statute in preventing the corporation from subjecting its policies scattered throughout the various States of the United States and foreign countries to one uniform rule violates the rights of plaintiff in error.

In making this contention plaintiff in error proceeds upon an assumption unwarranted by the history of life insurance companies writing tontine policies in Missouri since the passage of the statute and over-looks the fact that this plan of insurance is not peculiar to purely mutual companies doing life insurance business but is in use by all life insurance companies (Rec. 16), that the objector to the validity of the statute is a corporation doing business within the state that enacted the statute solely by virtue of that state's permission, and finally that the Fourteenth Amendment does not profess to

secure to all persons in the United States the benefit of the same laws and the same remedies.

In *Missouri v. Lewis*, 101 U. S. at page 31, the court, speaking through Mr. Justice Bradley, said: "The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of this line there may be a right of trial by jury and on the other side no such right. Each state prescribes its own mode of judicial proceedings."

Guthrie on Fourteenth Amendment, 70, 72.

The next particular in which the statute is alleged to violate the Fourteenth Amendment is that the statute makes a new contract for the parties different from the contract made between them.

This contention is fully answered and the validity of the statute asserted in case of *Orient Ins. Co. v. Daggs*, 172 U. S. 557. When this court reads the non-forfeiture statute into the policy in suit and reads the valued policy statute into the Daggs fire insurance policy it acts are in no wise different. Obviously the state's power of control extends to both.

The statute is not a regulation of commerce.

The business of life insurance is not commerce between the states and hence cannot be carried on in a state by a foreign corporation without comply-

our statute, Brewer, J., in the Wall case, 32 Fed. Rep. at pp. 276 and 277, says: "In the first place a technical argument can be made on the language of the statute. It says the value of the policy *shall* be determined in a certain way, and then that if the death of the insured occur during the term of temporary insurance covered by the value of the policy thus determined, the company *shall* be bound to pay the amount of the policy, 'anything in the policy to the contrary notwithstanding.' This language is broad enough to include a waiver, and may be construed as meaning that no stipulation, no waiver, no agreement for a different forfeiture—in fact, nothing that a party can put into a policy—shall defeat the right to recover the full amount if death occurs during this time of temporary insurance. Of course, this is a purely technical construction of the statute, and I am disposed to rest my conclusion more upon the matter of public policy. And here the history of insurance must be taken into consideration. It is notorious that many insurance companies were vigorous in insisting upon forfeitures, sometimes under very inequitable circumstances, and there was no little public clamor by reason thereof. Such clamor prompted many legislatures to interfere, and to seek by legislation to protect what they supposed the rights of the insured. Such seems to have been the thought of the Missouri legislature, and it evidently intended by its legislation to provide a fixed and absolute rule applicable to all cases—absolute and universal, because if it applied only in cases in

which the policies were silent, or if it could be waived or changed, a child can see that it would protect only so far as the insurance companies were willing. So, although no words of penalty are attached, no express denial of the right to waive—in fact, no words of negation in any direction—yet it seems to me fair to say that the affirmative language of this statute discloses a public policy which no court ought to question or refuse to enforce. *Railway Co. v. Peavey*, 29 Kan. 169. The legislature has by this language declared a rule in respect to forfeitures in life insurance policies; it has thus established the policy which it believes should obtain in this state and, though sitting on the federal bench, it is my duty to administer the laws of this state in the spirit in which they were enacted, and to uphold both their letter and spirit. It is voluntary with any foreign insurance company whether it shall come into this state to transact business; coming in, it should be willing to comply with all the statutes as to all business arising within this state, and no court, least of all a federal court, should hasten to release it from this obligation."

The freedom of defendant—a foreign corporation to make in Missouri a different contract from that contemplated and provided for by the Missouri statute—is by that statute prohibited. This prohibition if valid and effectual against a direct waiver, as was held in both the Wall and Price cases, certainly can not lose any of its effect when applied to a contract which seeks to accomplish by indirection that which the statute forbids to be done.

ment plan; whether they will have it for a large or a small amount; whether they will have the insurance payable upon maturity in a gross sum or distributed in instalments over a series of years; whether the premiums shall be paid annually, semi-annually or quarterly; who shall be the beneficiaries in the policy—all these are matters in which the statute permits absolute freedom.

After all these matters have been determined by the parties and the premiums for two full years have been paid, the statute then applies to the policy and prevents a forfeiture until the applicable reserve has been exhausted. The reserve consisting of the excess of the company's income from the policy each year over and above the cost of insurance for that year, the statutory requirement of its use for the benefit of the policy holder is one in the interest of fair, open and honest dealing. The company cannot be deprived of propery to which it is entitled, for the statute takes hold of an accumulated fund which belongs to the policy holder, making the computation of this accummulation upon a table approved of and in use by life insurance companies generally. In *Orient Ins. Co. v. Daggs*, *supra*, the court, in considering the valued policy section of the Missouri statute under the constitutional objection of deprivation of property without due process of law, though Mr. Justice McKenna, said: "We see no risk to insurance companies in this statute. How can it come? Not from fraud and not from change because, as we have seen, the presumptions of the statute do not obtain against

fraud or change in the valuation of the property. Risk then can only come from the failure to observe care—that care which it might be supposed without any prompting from the law, underwriters would observe and which, if observed, would make their policies true contracts of assurance; not seemingly so, but really so, not only when premiums are paying but when losses are to be paid. The state surely has the power to determine that this result is desirable and to accomplish it, even by a limitation of the right of contract claimed by plaintiff in error. It would be idle and trite to say that no right is absolute. *Sic utera tuo ut alieenum non laedas* is of universal and pervading obligation. It is a condition upon which all property is held. Its application to particular conditions must necessarily be within the reasonable discretion of the legislative power. When such discretion is exercised in a given case, by means appropriate and which are reasonable, not oppressive or discriminatory, it is not subject to constitutional objection. The Missouri statute comes within this rule."

The non-forfeiture statute will stand the test thus suggested; it operates alike on all corporations doing business in Missouri, foreign and domestic, writing policies of insurance upon life upon which a reserve has accumulated.

Guthrie on Fourteenth Amend. 70.

Wherefore the judgment of the Supreme Court of Missouri should be affirmed.

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NEW YORK LIFE INSURANCE COMPANY v. CRAVENS.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 262. Argued April 25, 1900.—Decided May 28, 1900.

The contract for life insurance in this case, made by a New York insurance company in the State of Missouri, with a citizen of that State, is subject to the laws of that State regulating life insurance policies, although the policy declares "that the entire contract contained in the said policy and in this application, taken together, shall be construed and interpreted as a whole and in each of its parts and obligations, according to the laws of the State of New York, the place of the contract being expressly agreed to be the principal office of the said company in the city of New York."

The power of a State over foreign corporations is not less than the power of a State over domestic corporations.

The business of insurance is not commerce, and the making of a contract of insurance is a mere incident of commercial intercourse in which there is no difference whatever between insurance against fire, insurance against the perils of the sea, or insurance of life.

THE controversy in this case is as to the amount due upon a policy of insurance issued by the plaintiff in error, upon the life of John K. Cravens, husband of the defendant in error.

The contention of the plaintiff in error is that there is only due on the policy, if anything, the sum of $2670; that of defendant in error is that she is entitled to the full amount of the policy, to wit, $10,000, less unpaid premiums.

These contentions depend chiefly for solution on the statute of Missouri, inserted in the margin,[1] Missouri Rev. Stat. 1879,

[1] SEC. 5983. Policies non-forfeitable, when.—No policies of insurance on life hereafter issued by any life insurance company authorized to do business in this State, on and after the first day of August, A.D. 1879, shall, after payment upon it of two full annual premiums, be forfeited or become void by reason of the non-payment of premiums thereon, but it shall be subject to the following rules of commutation, to wit: The net value of the policy when the premium becomes due and is not paid shall be computed upon the American experience table of mortality, with four and one half per cent interest per annum, and after deducting from three fourths of

c. 119, Art. 2, and the issue arising is, whether the defendant in error, as beneficiary in the policy because of the payment of

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such net value any notes or other indebtedness to the company, given on account of past premium payments on said policy issued to the insured, which indebtedness shall then be cancelled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy, and the term for which such temporary insurance shall be in force shall be determined by the age of the person whose life is insured at the time of default of premium, and the assumption of mortality and interest aforesaid; but if the policy shall be an endowment, payable at a certain time, or at death if it should occur previously, then if what remains as aforesaid shall exceed the net single premium of temporary insurance for the remainder of the endowment term for the full amount of the policy, such excess shall be considered as a net single premium, for a pure endowment of so much as such premium will purchase, determined by the age of the insured at date of defaulting the payment of premium on the original policy, and the table of mortality and interest as aforesaid, which amount shall be paid at the end of the original term of endowment, if the insured shall then be alive.

SEC. 5984. A paid-up policy may be demanded, when.—At any time after the payment of two or more full annual premiums, and not later than sixty days from the beginning of the extended insurance provided in the preceding section, the legal holder of the policy may demand of the company, and the company shall issue its paid-up policy, which, in case of an ordinary life policy, shall be for such an amount as the net value of the original policy at the age and date of lapse, computed according to the American experience table of mortality, with interest at the rate of four and a half per cent per annum, without deduction of indebtedness on account of said policy, will purchase, applied as a single premium upon the table rates of the company, and in case of a limited payment life policy, or of a continued payment endowment policy payable at a certain time, or of a limited payment endowment policy, payable at a certain time, or at death, it shall be for an amount bearing such proportion to the amount of the original policy as the number of complete annual premiums actually paid shall bear to the number of such premiums stipulated to be paid: Provided, that from such amount the company shall have the right to deduct the net reversionary value of all indebtedness to the company on account of such policy: and provided further, that the policy holder shall, at the time of making demand for such paid-up policy, surrender the original policy, legally discharged, at the parent office of the company.

SEC. 5985. Rule of payment on commuted policy.—If the death of the insured occur within the term of temporary insurance covered by the value of the policy as determined in section 5983, and if no condition of the insurance other than the payment of premiums shall have been violated by the insured, the company shall be bound to pay the amount of the policy,

four annual premiums, and notwithstanding the omission to pay the fifth and sixth annual premiums, is entitled to extended insurance as provided in section 5983, that is, to the full amount of the policy less unpaid premiums, or is entitled to the amount of commuted insurance tendered by plaintiff in error.

The case was submitted upon an agreed statement of facts substantially as follows:

That the defendant is a corporation organized and existing under the laws of the State of New York as a mutual life insurance company, without capital stock, having its chief office in the city of New York, and was, at the date of issuing the policy in question and since has been engaged in the business of insuring lives through branch offices in the different States and Territories of this country and certain foreign countries; and that it maintains agents and examiners in the State of Missouri.

On May 2, 1887, the local agent of the company solicited John K. Cravens, at his residence in Missouri, to insure his life in the

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the same as if there had been no default in payment of premiums, anything in the policy to the contrary notwithstanding: Provided, however, that notice of the claim and proof of the death shall be submitted to the company in the same manner as provided by the terms of the policy, within ninety days after the decease of the insured; and, provided, also, that the company shall have the right to deduct from the amount insured in the policy the amount compounded at six per cent interest per annum of all the premiums that had been forborne at the time of the decease, including the whole of the year's premiums in which the death occurs, but such premiums shall in no case exceed the ordinary life premium for the age at issue, with interest as last aforesaid.

SEC. 5986. The foregoing provisions not applicable, when.—The three preceding sections shall not be applicable in the following cases, to wit: If the policy shall contain a provision for an unconditional cash surrender value at least equal to the net single premium for the temporary insurance provided hereinbefore, or for the unconditional commutation of the policy to non-forfeitable paid-up insurance for which the net value shall be equal to that provided for in section 5984, or if the legal holder of the policy shall, within sixty days after default of premium, surrender the policy and accept from the company another form of policy, or if the policy shall be surrendered to the company for a consideration adequate in the judgment of the legal holder thereof, then, and in any of the foregoing cases, this act shall not be applicable.

company, and thereupon Cravens signed and delivered to the local agent a written application for the policy in suit. The application was made a part of the policy, and contained the following provisions:

"That inasmuch as only the officers of the home office of the said company in the city of New York have authority to determine whether or not a policy shall issue on any application, and as they act on the written statements and representations referred to, no statements, representations, promises or information made or given by or to the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on said company, or in any manner affect its rights, unless such statements, representations, promises or information be reduced to writing and presented to the officers of said company, at the home office, in this application. . . .

"That the contract contained in such policy and in this application shall be construed according to the laws of the State of New York, the place of said contract being agreed to be the home office of said company in the city of New York."

The application was signed by the agent of the company and forwarded to the latter's home office in New York, and thereupon the policy in suit was issued and transmitted to Kansas City by the company to its agent, who there received the same, and there delivered it to Cravens on the 20th of May, 1887, and collected the first premium provided to be paid.

Four annual premiums of $589.50 each were paid in Missouri. The fifth and sixth premiums were not paid. Cravens died November 2, 1892, in Missouri, and proof thereof was duly made.

The company had different forms of policies, and Cravens selected a non-forfeiting limited tontine policy, fifteen years' endowment, with the limited premium return plan of insurance. This plan is described in the policy as follows:

"This policy is issued on the non-forfeiting limited tontine policy plan, the particulars of which are as follows:

"That the tontine dividend period for this policy shall be completed on the 11th day of May, in the year nineteen hundred and two.

"That no dividend shall be allowed or paid upon this policy

unless the person whose life is hereby insured shall survive until completion of its tontine dividend period, and unless this policy shall then be in force.

"That surplus or profits derived from such policies on the non-forfeiting limited tontine policy plan as shall not be in force at the date of the completion of their respective tontine dividend periods, shall be apportioned among such policies as shall complete their tontine dividend periods."

At the end of the tontine period certain benefits were to be allowed, which are stated in the policy, but which need not be repeated.

The policy also contained the following provision:

"That if the premiums are not paid, as hereinafter provided, on or before the days when due, then this policy shall become void, and all payments previously made shall be forfeited to the company, except that if this policy, after being in force three full years, shall lapse or become forfeited for the non-payment of any premium, a paid-up policy will be issued on demand within six months after such lapse, with the surrender of this policy, under the same conditions as this policy, except as to payments of premiums, but without participation in profits, for an amount equal to as many fifteenth parts of the sum above insured as there shall have been complete annual premiums paid hereon when said default in the payment of premium shall be made; and all right, claim or interest arising, under statute or otherwise, to or in any other paid-up policy or surrender value, and to or in any temporary insurance, whether required or provided for by the statute of any State, or not, is hereby expressly waived and relinquished."

The total number of policies, of the plan of the policy in suit, issued in the year 1887 to the residents of all states and countries where the company was doing business was 5172, covering an aggregate of insurance of $20,154,981.

The amount of paid-up insurance to which the policy was entitled, at the date of lapsing, was $2670. No demand was made for it within six months after default, or at any time. Upon the death of Cravens the company offered to waive the failure to make such demand, and tendered defendant in error,

ing with all the conditions imposed by the legislation of that state.

Bank of Augusta v. Earle, 13 Pet. 519.
Paul v. Virginia, 8 Wall 168.
Liverpool Ins. Co. v. Massachusetts, 10 Wall 566.
Cooper Mfg. Co. v. Ferguson, 113 U. S. 727.
Phila. Fire Assn. v. New York, 119 U. S. 110.
Hooper v. California, 155 U. S. 648.
Orient Ins. Co. v. Daggs, 172 U. S. 557.
Conn. Mut. Life Ins. Co. v. Spratley, 172 U. S. 602.

In *Hooper v. California*, this court, speaking through Mr. Justice White said: "Whilst it is true that in *Paul v. Virginia*, and in most of the cases in which it has been followed, the particular contract under consideration was for insurance against fire, the principle upon which these cases were decided involved the question of whether a contract of insurance of any kind constituted interstate commerce. The Court in reaching its conclusion upon this question was not concerned with any matter of distinction between marine and fire insurance, but proceeded upon a broad analysis of the nature of interstate commerce and of the relation which insurance contracts generally bear thereto. Thus in *Paul v. Virginia*, the Court, speaking through Mr. Justice Field, said: "Issuing a policy of insurance is not a transaction of commerce. The

policies are simply contracts of indemnity against loss by fire, entered into between the corporations and the assured for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are then local transactions and are governed by the local laws. They do not constitute a part of the commerce between the states any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia, would constitute a portion of such commerce." Further on in the same opinion the Court observes:

"It is evident then, as we have said above, that the attempt to so distinguish between policies of marine insurance and policies of fire insurance, as to reach the deduction that there is a constitutional difference between the business of a corporation issuing policies of one kind and that of a corporation dealing in policies of the other kind which affects the question of a state's

authority to control the business of either is based upon a fundamental misconception of the nature of the constitutional provision relied upon. It ignores the real distinction upon which the general rule and its exceptions are based and which consists in the difference between inter-state commerce or an instrumentality thereof, on the one hand, and the mere incidents which may attend the carrying on of such commerce on the other. This distinction has always been carefully observed and is clearly defined by the authorities cited. If the power to regulate interstate commerce applied to all the incidents to which such commerce might give rise, and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states; and would exclude state control over many contracts purely domestic in their nature. The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce."

Measured by the rule thus stated the contract at bar is not an instrumentality of commerce. It was not the subject of trade and barter—could not be offered in the market as something having an existence and value independent of the parties to it —it is not a commodity to be shipped or forwarded from one state to another and then put up for sale. Like the fire and marine insurance contract, it is a personal contract completed by the signatures of the parties to it and the transfer of the consideration.

Does statute deprive plaintiff in error of contractual liberty without due process of law?

The statute provides as follows: "No policies of insurance on life hereafter issued by any life insurance company authorized to do business in the state on and after the first day of August, A. D. 1879, shall after payment upon it of two full annual premiums be forfeited or become void by reason of the non-payment of premium thereon, but it shall be subject to the following rules of commutation: The net value of the policy when the premium becomes due and is not paid shall be computed upon the American experience table of mortality, with four and one-half per cent interest per annum, and after deducting from three-fourths of such net value any notes or other indebtedness to the company, given on account of past premium payments on said policy issued to the insured, which indebtedness shall then be cancelled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy, and the term for which such temporary insurance shall be in force shall be determined by the age of the person whose life is insured at the time of default of premium, and the assumption of mortality and interest aforesaid." It also provides that the commutation thus provided shall prevail, "anything in the policy to the contrary notwithstanding."

It is apparent that the statute makes no contract for the parties. In the selection of the contract—whether they will have a policy upon the Life plan, upon the Term plan or upon the Endow-

Counsel for Parties.

and still tenders her, the amount of such paid-up policy, which she declined, and still declines.

On the 11th of May, 1891, Cravens was fifty-three years old, "and the term of temporary insurance procured at that date by three fourths of the net value of the policy, taken as a single premium for the amount written in the policy, was six years and forty-six days from the 11th day of May, 1891, making said policy, if subject to said extended insurance, in force at the death of the said Cravens."

The defendant in error claims under the policy $10,000, less the amount of unpaid premiums, with interest thereon, which left a balance of $8749.21, with interest at six per cent from November 30, 1892. The plaintiff in error admitted and offered to pay the sum of $2670, which plaintiff in error declined to receive.

The trial court rendered a judgment for the plaintiff (defendant in error) for the sum of $2670.

On appeal to the Supreme Court of the State the judgment was reversed, and the case was remanded with directions to enter judgment for plaintiff (defendant in error) for the sum of $8749.21, with interest at six per cent from November 30, 1892.

The case was then brought here.

It is urged as error against the judgment of the Supreme Court of the State that it makes the law of Missouri and not the law of New York the law of the contract, as provided in the application for the policy, thereby denying to the plaintiff in error a contractual liberty without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States; and that the statute of Missouri is an attempted regulation of interstate commerce.

Mr. Frederick N. Judson for plaintiff in error. *Mr. George W. Hubbell* was on his brief.

Mr. William B. C. Brown for defendant in error. *Mr. J. V. C. Carnes* and *Mr. James H. Cravens* were on his brief.

Opinion of the Court.

MR. JUSTICE MCKENNA after stating the case, delivered the opinion of the court.

The plaintiff in error presents its contentions in many forms, but they are all reducible to one, to wit, that the statute of Missouri has been decided to supersede the terms of the policy, and to be the rule and measure of the rights and obligations of the parties, notwithstanding the application for the policy declares "that the entire contract contained in the said policy and in this application, taken together, shall be construed and interpreted as a whole and in each of its parts and obligations, according to the laws of the State of New York, the place of the contract being expressly agreed to be the principal office of the said company, in the city of New York."

What, then, is the meaning of the Missouri statute, or, rather, what meaning did the Supreme Court declare it to have?

It declared that the statute did not have the meaning the trial court decided it to have. In other words, it declared that the policy did not come within the exception of the statute providing for paid-up insurance, in lieu of temporary insurance, which was one of the contentions of the plaintiff in error, and on account of which it had tendered the sum of $2670, and sustaining which the trial court rendered its judgment.

With this part of the opinion, however, we have no concern. Our review is only invoked of that part of the opinion which decides that the Missouri statute is the law of the policy, and which annuls the provisions of the policy which contravene the statute. And even of this part our inquiry is limited. If we are bound by the interpretation of the statute we need not review the reasoning by which that interpretation was reached. And we think we are bound by it.

The court said, though more by inference than by direct expression, that the statute was a condition upon the right of insurance companies to do business in the State.

This conclusion it fortified by the citation of cases, and said (148 Mo. 583):

"Foreign insurance companies which do business in this State do so, not by right, but by grace, and must in so doing con-

form to its laws; they cannot avail themselves of its benefits without bearing its burdens. Moreover, the State may prescribe conditions upon which it will permit foreign insurance companies to transact business within its borders or exclude them altogether, and in so doing violates no contractual rights of the company. *State* v. *Stone*, 118 Mo. 388; *Daggs* v. *Ins. Co.*, 136 Mo. 382; *S. C.* 172 U. S. 557."

And further:

"As the non-forfeiture clause in section 5983 does not come within the exceptions specified in section 5986, it would seem that the provision in the policy with respect to its forfeiture or lapse after being in force three full years, by the non-payment of premiums, is void and of no effect, and that such statutory provision cannot be waived.

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"It is well settled that the legislature of the State has the power to pass laws regulating and prescribing rules by which foreign insurance companies may do business in this State, and to prohibit them from doing so altogether if inclined. *Paul* v. *Virginia*, 8 Wall. 168; *State* v. *Stone*, *supra*; *Hooper* v. *California*, 155 U. S. 648; *Daggs* v. *Insurance Co.*, *supra*. This case has recently been affirmed by the Supreme Court of the United States.

"It logically follows that in passing the sections of the statute quoted the legislature did not exceed the powers conferred upon it by the state constitution, and that such legislation is not in conflict with any provision of the Constitution of the United States."

From the Missouri law as thus established, may the plaintiff in error claim exemption by virtue of the Constitution of the United States?

What the powers of a corporation are in relation to the State of its creation—what the powers of a corporation are in relation to a state where it is permitted to do business, was declared early in the existence of this court, and has been repeated many times since. What those powers are we took occasion to repeat in *Waters-Pierce Oil Co.* v. *The State of Texas*, decided at the present term. 177 U. S. 28.

The case arose from a liberty of contract asserted by the Waters-Pierce Oil Company against certain statutes of the State of Texas prohibiting contracts in restraint of competition in trade. The statute was not only assailed because it took away the liberty of contract, but because it discriminated between persons and classes of persons. The latter ground we declined to consider, because it did not arise on the record. Of the former we said:

"The plaintiff in error is a foreign corporation, and what right of contracting has it in the State of Texas? This is the only inquiry, and it cannot find an answer in the rights of natural persons. It can only find an answer in the rights of corporations and the power of the State over them. What those rights are and what that power is has often been declared by this court.

"A corporation is the creature of the law, and none of its powers are original. They are precisely what the incorporating act has made them, and can only be exerted in the manner which that act authorizes. In other words, the State prescribes the purposes of a corporation and the means of executing those purposes. Purposes and means are within the State's control. This is true as to domestic corporations. It has even a broader application to foreign corporations."

And as the state court had held that the statute was a condition imposed upon the oil company doing business within the State, we said of the statute that, "whatever its limitations were upon the power of contracting, whatever its discriminations were, they became conditions of the permit and were accepted with it."

We stated the exceptions of the rule to be "only cases where a corporation created by one State rests its right to enter another and engage in business therein upon the Federal nature of its business."

Is the plaintiff in error within the exception? If not, the pending controversy must be determined against it.

It is difficult to give counsels' contentions briefly and at the same time clearly, nor are we sure that we can distinguish by precise statement the arguments directed to the invalidity of

the statute of Missouri as an unconstitutional interference with the contractual liberty of the plaintiff in error, from the arguments which assail the statute as an attempted regulation of commerce between the States. This, however, not on account of any want of clearness in counsel's argument, but on account of the many ways which they have presented and illustrated the argument, and which cannot be noticed in detail without making this opinion too long. We realize the propositions are not the same and should not be confused, though made somewhat dependent upon a common reasoning.

1. A policy of mutual life insurance, it is contended, is an interstate contract, and the parties may choose its "applicatory law." Instances under the law of usury, instances under private international law, are cited as examples and authority. But if such cases apply at all, they necessarily have limitation in the policy of the State. This is not denied, but it is contended that contracting for New York law to the exclusion of Missouri law was "in nowise prejudicial to the interests of the State of Missouri or violative of its public policy."

But the interests of the State must be deemed to be expressed in its laws. The public policy of the State must be deemed to be authoritatively declared by its courts. Their evidence we cannot oppose by speculations or views of our own. Nor can such interests and policy be changed by the contract of parties. Against them no intention will be inferred or be permitted to be enforced.

In passing on the statute in controversy we said, by Mr. Justice Gray, in *Equitable Life Assurance Society* v. *Clements*, 140 U. S. 226:

"The manifest object of this statute, as of many statutes regulating the forms of policies of insurance on lives or against fires, is to prevent insurance companies from inserting in their policies conditions of forfeiture or restriction, except so far as the statute permits. The statute is not directory only, or subject to be set aside by the company with the consent of the assured; but it is mandatory and controls the nature and terms of the contract into which the company may induce the assured to enter. This clearly appears from the unequivocal words of command

and of prohibition above quoted, by which, in sec. 5983, 'no policy of insurance' issued by any life insurance company authorized to do business in this state 'shall, after the payment of two full annual premiums, be forfeited or become void by reason of the non-payment of premium thereon; but it shall be subject to the following rules of commutation;' and in sec. 5985, that if the assured dies within the term of temporary insurance, as determined in the former section, 'the company shall be bound to pay the amount of the policy,' 'anything in the policy to the contrary notwithstanding.'"

And after stating the cases in which the terms of the policy are permitted to differ from the plan of the statute, it was further said:

"It follows that the insertion, in the policy, of a provision for a different rule of commutation from that prescribed by the statute, in case of default of payment of premium after three premiums have been paid; as well as the insertion, in the application, of a clause by which the beneficiary purports to 'waive and relinquish all right or claim to any other surrender value than that so provided, whether required by a statute of any State or not;' is an ineffectual attempt to evade and nullify the clear words of the statute."

In *Orient Insurance Company* v. *Daggs*, 172 U. S. 557, the insurance company contended it had the constitutional right to limit by contract its liability to actual damages caused by fire against the provision of the statute which made, in case of total loss, the amount for which the property was insured the measure of damages. We sustained the statute independently of the ground that it was a condition of the permission of the company to do business in the State. We sustained it on the ground of the clear right of the State to pass it, and to accomplish its purpose by limiting the right of the insurer and insured to contract in opposition to its provisions.

Further comment on this head may not be necessary, and we only continue the discussion in deference to the insistence of counsel upon the interstate character of the policy in suit. It is the basis of every division of their argument, and an immunity from control is based upon it for plaintiff in error, which, it

seems to be conceded, the State can exert over corporations of its own creation.

An interstate character is claimed for the policy, as we understand the argument, because plaintiff in error is a New York corporation and the insured was a citizen of Missouri, and because, further, the plaintiff in error did business in other States and countries. Does not the argument prove too much? Does it depend upon the residence of plaintiff in error in New York? If so, it would seem that every contract between citizens of different States becomes at once an interstate contract, and may be removed from the control of the laws of the State at the choice of parties. If the argument does not depend on the residence of the plaintiff in error, but on the other elements, a Missouri insurance corporation can have the same relation to them as plaintiff in error, and can be, as much as plaintiff in error claims to be, "the administrator of a fund collected from the policy holders in different States and countries for their benefit"—the condition which plaintiff in error claims demonstrates the necessity of a uniform law to be stipulated by the parties exempt from the interference or the prohibition of the State where the insurance company is doing business. And yet plaintiff in error seems to concede that such power of stipulation Missouri corporations do not have, while it, a foreign corporation and because it is a foreign corporation, does have.

After stating the necessity of a uniform law and an equal necessity that parties may stipulate for it, counsel for plaintiff in error say:

"It necessarily follows, therefore, that the insurance policy contracts of foreign insurance companies, as contracts of other foreign corporations, made by them with the citizens of a State, when doing business in that State through the comity of the State, are like the contracts of natural persons, subject to the limitations of their own charters, and the situs of such contracts is to be determined by the fundamental rules of 'universal law.'

"As will be hereafter seen, this status as foreign corporations does not mean that they were not subject to the laws of the State enacted in the full plenitude of the police power of the State. The State doubtless could limit their contractual power by prohibiting the making of certain contracts. But unless the

foreign corporation is reincorporated as a domestic corporation, it remains a foreign corporation, and its contracts with citizens of the State are interstate contracts, subject to the right of choice of law thereof, which is inherent in the law of interstate contracts."

A foreign corporation undoubtedly is not a domestic corporation, and the distinction must often be observed, but the deduction from it by plaintiff in error cannot be maintained.

The power of a State over foreign corporations is not less than the power of a State over domestic corporations. No case declares otherwise. We said in *Orient Ins. Co.* v. *Daggs, supra:*

"That which a State may do with corporations of its own creation it may do with foreign corporations admitted into the State. This seems to be denied, if not generally, at least as to plaintiff in error. The denial is extreme and cannot be maintained. The power of a State to impose conditions upon foreign corporations is certainly as extensive as the power over domestic corporations, and is fully explained in *Hooper* v. *California*, 155 U. S. 648, and need not be repeated."

2. Is the statute an attempted regulation of commerce between the States? In other words, is mutual life insurance commerce between the States?

That the business of fire insurance is not interstate commerce is decided in *Paul* v. *Virginia*, 8 Wall. 168; *Liverpool Ins. Co.* v. *Mass.*, 10 Wall. 566; *Phila. Fire Asso.* v. *New York*, 119 U. S. 110. That the business of marine insurance is not is decided in *Hooper* v. *California*, 155 U. S. 648. In the latter case it is said that the contention that it is "involves an erroneous conception of what constitutes interstate commerce."

We omit the reasoning by which that is demonstrated, and will only repeat, "The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against the 'perils of the sea.'" And we add, or against the uncertainty of man's mortality.

Judgment affirmed.